TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 192

HERBERT LESTER TYSON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 29, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NORTH CAROLINA, DISTRICT COURT AT RALEIGH

HERBERT LESTER TYSON, Plaintiff (Pauper Plaintiff),

against

UNITED STATES OF AMERICA, Defendant

SUMMONS AND RETURN—Filed Nov. 23, 1932

The President of the United States of America, to the Marshal of the Eastern District of North Carolina, Greeting:

You are hereby commanded to summon W. H. Fisher, U. S. District Attorney, Wilmington, N. C., a citizen and resident of the Eastern District of North Carolina, to appear at Raleigh, N. C., then and there to answer the complaint of Herbert Lester Tyson, Cumberland County, the plaintiff herein, a citizen and resident of the State of North Carolina, which complaint has been filed in said court and served together with this Summons. And let the said defendant take notice, that if he fail to answer the said complaint within the time allowed by law, to wit: Within 60 days after the service of complaint, the plaintiff will take judgment against him for the relief demanded in the complaint according to the regular course of the Court.

Herein fail not, and have you then and there this Summons.

Witness, The Hon. Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, in said District, the 17 day of Nov., 1932, and in the 157 year of the Independence of the United States. (Seal.)

S. A. Ashe, Clerk; by W. M. Bateman, Deputy Clerk.

A True Copy:
Test: ——, Clerk.

Marshal's Return

Received at Wilmington, N. C., Nov. 19th, 1932. Executed same day and place by personal service and copy to W. H. Fisher, U. S. Attorney,

E. C. Geddie, U. S. Marshal; by I. D. Harrelson, Deputy.

$2.00.

Received at Wilmington, N. C., Nov. 19th, 1932. Executed same day and place by personal service and copy to W. H. Fisher, U. S. Attorney.

(S.) E. C. Geddie, U. S. Marshal, by I. D. Harrelson, Deputy.

$2.00.

I certify that the within is entered and filed this day Nov. 23, 1932. S. A. Ashe, Clerk.

[fol. 3] In United States District Court for the Eastern District of North Carolina

[Title omitted]

Petition—Filed November 17, 1932

Plaintiff above named, respectfully shows the Court and alleges as follows:

I

That the plaintiff is a citizen and resident of the County of Cumberland, State of North Carolina, and of the Eastern District thereof.

II

That the plaintiff enlisted in the United States Army for military service in the World War on the 2nd day of August, 1918, at Elizabethtown, North Carolina, and remained in said service until the 18th day of December, 1918, when he was given an honorable discharge therefrom under disability at Camp Stewart, Virginia; that during the period of his said service the plaintiff served as Private of 313th Fire and Guard Company, Quartermaster Corps, United States Army.

III

That during said period of military service, desiring to be insured against the hazard of risk of death or total and permanent disability this plaintiff applied for a policy of War Risk Insurance in the sum of $10,000 and said application was accepted, and thereafter there was deducted monthly by the defendant from the plaintiff's monthly pay premium for said insurance and said insurance was granted and the certificate or policy of War Risk Insurance was duly issued to him by the terms whereof the defendant agreed to pay to the plaintiff the sum of $57.50 per month in the event of death or total and permanent disability in- [fol. 4] curred during the life of said insurance contract; that the monthly payments of premium were duly made on the same until the happening of the event against which the said insurance was granted; that the said certificate of insurance issued to the plaintiff was continuously from the time of issuance thereof until the date of the bringing of this action and still is in full force and effect.

IV.

That during the life of said insurance policy contract and while the plaintiff was in active military service of the United States Army, plaintiff as a result of and in connection with the performance of his duties in said Army while in camp at Lambert's Point, Virginia, was stricken with arthritis to such an extent that the plaintiff was required to spend ninety-eight days in an embarkation hospital at Camp Stewart, Newport News, Virginia; that on account of such di-ability resulting from said service, plaintiff was discharged from service under disability at Camp Stewart on December 18th, 1918; that since the date of his said discharge, the plaintiff has been continuously under the necessity of having medical treatment; that the plaintiff's injuries and disabilities resulting from such causes have continued unabated and in an increasingly aggravated form in that the plaintiff on account of the injuries and disease resulting from his said service, has been disabled and handicapped in the use of his arms and legs, and that nearly all the muscles of his body have been violently and painfully affected, and his heart has likewise been seriously affected by the said disease of arthritis and its consequent results; that the plaintiff on account thereof has been from the

date of his discharge until the time of bringing this action, and still is totally and permanently disabled and thereby rendered unable to follow continuously any substantially gainful occupation.

V.

That by reason of the aforesaid injuries sustained by the plaintiff during the period of his service in the United States Army, rendering the plaintiff as aforesaid, unable to follow continuously any substantially gainful occupa-
[fol. 5] tion, and totally and permanently disabling the plaintiff from the time of his said discharge until now, the plaintiff is entitled to receive from the defendant under the terms of the said policy contract the sum of $57.50 per month, for each and every month from the date of his said discharge, to-wit, the 18th day of December, 1918, until the date of bringing this action, and thereafter until the full amount of said policy shall have been paid.

VI.

That the plaintiff has made due proof of his said disability to the said defendant and to the United States Veterans Bureau and the Bureau of War Risk Insurance and the Director thereof, and demanded payment of the aforesaid amounts, but defendant and said Bureau and its Director disagreed with the plaintiff as to his disability and has totally failed and refused to pay the said sum.

Wherefore, plaintiff prays that judgment be rendered in favor of the plaintiff in the sum of Nine Thousand Five Hundred Forty Five ($8,545.00) Dollars, being the amount due under said policy at the rate of $57.50 per month, from the date of his discharge, to-wit, December 18, 1918, until the filing of this action.

And the plaintiff further prays judgment against this defendant in the sum of $57.50 for each and every month after the 19th day of October, 1932, until the full amount due under said policy shall have been paid, and for costs herein incurred, and for reasonable attorneys' fees. And plaintiff requests that a jury try this cause.

(S.) Herbert Lester Tyson. (S.) O. F. Johnson,
(S.) Biggs & Broughton, Attorneys for Plaintiff.

[fol. 6] *Duly sworn to by Herbert L. Tyson. Jurat omitted in printing.*

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed May 10, 1933

The defendant, for answer to the petition herein, alleges:

1. That the allegations of paragraph one of the petition are denied for the want of information and belief.

2. Answering the allegations of paragraph two, it is admitted that the above named plaintiff entered the military service of the United States on August 4, 1918, instead of August 2, 1918, and that he was discharged from the military service of the United States on December 18, 1918. The remaining allegations of paragraph two are denied for the want of information and belief.

3. Answering the allegations of paragraph three, it is admitted that while in the military service of the United States the plaintiff applied for and was granted a contract of War Risk Term Insurance in the sum of Ten Thousand Dollars ($10,000.00) by the terms of which it became payable in the event of total and permanent disability or death while said insurance was in force and effect of monthly installments of Fifty-seven and 50/100 Dollars ($57.50) each; that the plaintiff paid the premiums on said contract of War Risk Insurance up to and including the month of December 1918. The remaining allegations of paragraph three are denied.

4. Answering the allegations of paragraph four, it is admitted that plaintiff was discharged from the military service of the United States on December 18, 1918. The remaining allegations of paragraph four are denied.

[fol. 8] 5. The allegations of paragraph five are denied.

6. Answering the allegations of paragraph six, it is admitted that plaintiff has made demand upon the defendant for the payment of benefits upon the aforesaid contract of War Risk Term Insurance, that said demand has been denied and that there now exists a disagreement with respect thereto.

Wherefore, defendant prays that this action be dismissed and that it recover its costs.

(S.) W. H. Fisher, United States Attorney.

Duly sworn to by W. H. Fisher. Jurat omitted in printing.

[fol. 9] In United States District Court for the Eastern District of North Carolina, Raleigh Division, September Term, 1934

No. 1799—Law

Herbert Lester Tyson, Plaintiff

vs.

United States of America, Defendant

Judgment—Filed Sept. 11, 1934

This cause having come on to be heard at this September Term, 1934, of the United States District Court, at Raleigh, before His Honor, I. M. Meekins, Judge; and a Jury having been empaneled to try the cause, and the defendant having moved to dismiss the action for want of jurisdiction, in that the suit was not instituted within the time in which the United States has consented to be sued, as prescribed by statute; and certain records having been offered in evidence, and certain admissions having been made in open Court, the Court finds there from the following facts:

On December 2, 1930, Veterans Administration, through its proper officer, addressed a letter to Herbert Lester Tyson, enclosing Forms 526-F and 526-C.

On December 10, 1930, plaintiff signed and executed Form 526-F of the Veterans Administration, adjudication service, which was received by the Veterans Administration, December 12, 1930, and on December 11, 1930, plaintiff signed and executed, before a Notary Public, Form 526-C of the Veterans Administration, which forms were received by the Veterans Administration at Washington on the 12th day of December, 1930.

On July 2, 1931, plaintiff signed and executed Form 579 of the Veterans Administration, same being claim for In-

surance—Total and Permanent Disability, and which said claim was received by the Veterans Administration at Washington, on July 3, 1931.

Letter of Denial was issued by the proper officer of the Veterans Administration, dated November 12, 1932, the same being addressed to Herbert Lester Tyson. The envelope containing said letter being postmarked at Washington, November 14, 1932, and was received by the said Herbert Lester Tyson at his R. F. D. address in Bladen County, North Carolina, on November 16, 1[illegible].

[fol. 10] Summons was issued and petition filed on November 17, 1932, and copy of petition was served upon the United States Attorney on November 19, 1932.

The foregoing papers constitute the evidence offered in this case.

Whereupon, upon motion of J. O. Carr, United States Attorney for the Eastern District of North Carolina, it is ordered, adjudged and decreed that the Court has not acquired jurisdiction of this cause, and that the same be dismissed. The plaintiff having sued in forma pauperis no costs are taxed against him.

Done at Raleigh, North Carolina, this 11th day of September, 1934.

(S.) I. M. Meekins, United States District Judge.

[fol. 11] In United States District Court

[Title omitted]

Bill of Exceptions—Filed Nov. 28, 1934

Be it remembered, that upon the trial of this cause in this Court at a Regular Term of the Court begun and held in the City of Raleigh, N. C., on the 11th day of September, 1934, the Honorable I. M. Meekins, District Judge for the Eastern District of North Carolina, being present and presiding the plaintiff being represented by J. M. Broughton and H. C. Blackwell, and the defendant being represented by J. O. Carr, United States Attorney, and W. B. Snow, Special Assistant to the Attorney General, when and where the following proceedings were had:

The defendant moved to dismiss the action for want of jurisdiction in that, as contended by the defendant, the suit was not instituted within the time in which the United States has consented to be sued, as prescribed by statute.

In the consideration of this motion, the following papers were offered in evidence and considered by the Court:

(1) On December 2nd, 1930, the Veterans Administration, through its proper officer, addressed a letter to Herbert Lester Tyson, enclosing Forms 526-F and 526-C, copies of said letter and said forms are, respectively, Exhibits A-1, A-2, and A-3, and are attached to and made a part of this bill of exceptions.

(2) On July 2nd, 1931, plaintiff signed and executed Form 579 of the Veterans Administration, same being claim for insurance—total and permanent disability, a copy of [fol. 12] which, marked Exhibit "B" is attached to and included as a part of this bill of exceptions.

(3) Copy of the letter of denial, dated November 12, 1932, referred to in the judgment, is attached hereto as Exhibit "C" as a part of this bill of exceptions.

Following the introduction of the above exhibits and the admissions upon which the facts in the judgment are found, judgment was rendered by the Court in favor of the defen-ant, as appears from the judgment which is a part of the record herein.

To the signing and entering of the judgment in this cause, the plaintiff in apt time objected; objection overruled, to which action of the Court the plaintiff then and there excepted, and prays the Court to sign and seal this, the defendant's first and only exception in the bill of exceptions, which is accordingly done this 15th day of November, 1934.

(S.) I. M. Meekins, United States District Judge.
(Seal.) (S.) John H. Manning, Asst. U. S. District Attorney.

Service of the foregoing bill of exceptions is hereby accepted, and copy received.

STIPULATION AS TO BILL OF EXCEPTIONS

It is stipulated and agreed that the foregoing bill of exceptions, including the attached exhibits therein referred

to, is true and correct, and is hereby approved, and shall constitute a part of the record on appeal to the Circuit Court of Appeals.

This the 15th day of November, 1934.

(S.) J. M. Broughton, Attorney for Plaintiff. (S.) John H. Manning, Asst. U. S. District Attorney.

[fol. 18] EXHIBIT A-1

(Copy)

Veterans' Administration

United States Veterans' Bureau

Charlotte, N. C. Regional Office,
December 2, 1930.

51-A-84
C-776 289

Mr. Herbert L. Tyson,
R. F. D. #7,
Fayetteville, N. C.

DEAR SIR:

You are informed that your case has been considered and the Rating Board of this office is of the opinion that you are not entitled to compensation for the reason that you are not shown to have a service connected disability which disables you to a compensable degree.

The above rating is based upon report of physical examination made November 12, 1930, and all other evidence in your file in accordance with the new schedule of disability ratings.

There are enclosed Forms 526-c and 526-F, which you should execute and return without delay if you desire to apply for Disability Allowance.

All future correspondence relative to your claim should bear C-776 289.

By direction, (Signed) R. G. Coldwell, Regional Adjudication Officer, Charlotte, N. C.

Encs. (2).

[fol. 14] EXHIBIT A-2

(Copy)

United States Veterans' Bureau

Adjudication Service

Form 526-F

C-Number 776 289.
Date: Dec. 10, 1930.

I hereby make formal application for any benefits under the War Risk Insurance Act, as amended, and the World War Veterans' Act, 1924, as amended, to which it may be found that I am, or have been, entitled.

I have not* previously made application for the benefits.

(S.) Herbert L. Tyson,
(Full Name)
Pvt. 1 class, 313, Fire & Guard, Q. M. C.
(Bank and Organization at discharge)
Fayetteville, N. C., R. F. D. 7.
(Present Post Office Address)

Received Dec. 12, 1930. Mail Section, R-18.
Received Dec. 12, 1930. Adjudication Division. R-18.

[fol. 15] EXHIBIT A-3

(Copy)

United States Veterans' Bureau

Form 526-c

Application of Veteran

For Disability Allowance Under Section 200, World War Veterans' Act, 1934, as Amended July 3, 1930

Received Dec. 12, 1930. Mail Section, R-18.
Received Dec. 12, 1930. Adjudication Division, R-18.

Name: (Print Clearly)		Tyson	Herbert	Lester	
		(Last name)	(First name)	(Middle name in full)	
Address:	7	R. F. D.	Fayetteville	N. C.	
	(Number)	(Street)	(City or town)	(State)	

*If you have made previous application, either by letter or form, cross out the word "not".

I hereby apply for disability allowance under the provisions of Section 200 of the World War Veterans' Act, 1924, as amended July 3, 1930, and submit the following facts as evidence that I am eligible for that allowance.

1. (a) Place of birth *Fayetteville, N. C.* (b) Date of birth *June 20, 1890*

2. Description of applicant as of date of this application: Sex: *Male;* Race: *White;* Weight: *150* pounds; Height: *70½* inches; Color of hair: *Brown*; Color of eyes: *Blue;* Complexion: *Fair.*

3. Make a cross (X) after branches of service you served in: Army, X; Navy, ——; Marine Corps, ——; Coast Guard, ——.

4. Give dates of enlistment and discharge for each period or periods of service during the World War, commencing prior to November 11, 1918.

[fol. 16]

Enlisted Date	Place	Serial No.	Discharged Date	Place	Rank and organization	Character of discharge
Aug. 4, 1918	Syracuse N. Y.	4306524	12-18-18	Camp Stewart, Newport News, Va.	Pvt. 1st cl., 313th Fire & Guard	Honorable (S. C. D.)

5. (a) Have you ever applied for disability compensation? *Yes.* (b) When and where? *Reg. Office, Charlotte, N. C.* (c) What is your Compensation Claim number? *C-776 289.* (d) Have you ever been physically examined for the United States Veterans' Bureau? *Yes.* (e) If so, give date and place of last examination: *Nov. 12, 1930, Regional office, Charlotte, N. C.*

6. (a) Are you in receipt of retirement pay? *No.* (b) Are you in receipt of reduced retirement pay? *No.* (c) Are you in receipt of retainer pay? *No.* (d) Are you in receipt of a pension? *No.* (e) Are you in receipt of disability compensation? *No.* (f) Are you in receipt of insurance benefits? *No.*

Note—If during any of these enlistments you served under a name other than the one used in this application, state the name under which you served, the period of the enlistment, and full explanation.

7. Nature of disease or injury on account of which disability allowance is claimed: *Arthritis and Heart trouble.*

8. Give full name and complete address of nearest relative: *Mrs. Sudie Tyson, Fayetteville, N. C., R. F. D. 7. (Wife.)*

9. Have you ever been dishonorably discharged from any period of service in any branch of the military or naval service? *No.* If answer is "Yes" state rank and organization at time of dishonorable discharge, and the date of the dishonorable discharge: ——.

10. (a) Are you employed? *Yes.* (b) What is your regular trade or vocation? *Farming.*

11. (a) Did you file a Federal income tax return for the last year? *No.* (b) Where? ——. (c) Were you exempted from payment of an income tax? *Yes.* (d) If so, why? *I did not have a taxable income.*

I hereby certify that answers to all questions are true and complete to the best of my knowledge and belief. (Note: Sections of law printed on reverse side of form.)

(S) Herbert L. Tyson, Signature of claimant.

[fol. 17] Subscribed and sworn to before me this 11th day of Dec. 1930 by Herbert L. Tyson, claimant, to whom the statements herein were fully made known and explained.

Lonnie Carrell, Notary Public. (Seal.) My com. exp. Jan. 28th, 1932.

Be sure to answer a, b, c, and d, under question 11.

[fol. 18] EXHIBIT B.

(Copy)

United States Veterans' Bureau

Adjudication Service

Form 579—Rev. June, 1927

Claim for Insurance—Permanent Total Disability

Herbert Lester Tyson, believe myself to be entitled to
(Name of claimant)
receive the monthly payments of insurance granted by the United States to me under certificate of policy number ——,

on account of permanent total disability resulting from *acute arthritis.*

My permanent home address is *Fayetteville, N. C., R. F. D. #7.*

I desire checks mailed to Herbert Lester Tyson, Fayetteville, N. C., Route 7.

In support of my claim to such insurance I make the following statement as true to the best of my knowledge and belief:

1. Under what name did you serve? *Herbert Lester Tyson.*

2. Color: *White.* Date of birth: *June 20, 1890.* Place of birth: *Cumberland Co., N. C.*

3. Make a cross (X) after branches of service you served in: General Service, ——; Limited Service, X; Army, X; Navy, ——; Marine Corps, ——; Coast Guard, ——; (a) Give Serial No. *4306524.*

4. Date you last entered service: *August 4, 1918.* (a) Place of entry, *Elizabethtown, N. C.* (b) Have you had any previous military service? *No.* (c) If so, give dates of enlistment and discharge, rank and organizations: ——.

5. Date of last discharge: *December 18, 1918.* Place of discharge: *Camp Stewart, Va.*

6. Company and regiment or organization, vessel on which, or station at which, you last served: *313th Fire and Guard Company, Quartermaster Corps.*

7. Rank or rating at time of discharge: *Private.*

8. Nature of discharge: Honorable, X; Ordinary, ——; Dishonorable, ——; Bad conduct, ——; S. C. D., X.

9. Date disability began: *September 10, 1918.*

10. Cause of disability: *Acute Arthritis.*

11. Where received: *Lambert Point, Va.*

[fol. 19] 12. Did you receive treatment at an Army or Navy Hospital or any other hospital? *Yes.* (a) If so, state name and location of the hospital and dates of treatment: *Ninety-eight days in hospital at Portsmouth, Va.*

13. Name and address of physicians who have attended you since your disability began: *Dr. D. S. Currie, Parkton, N. C.*

14. Are you confined to bed? *No.* Do you require constant nursing or attendant? *No.*

15. Name and address of nurse or attendant: ——.

16. Are you willing to accept medical or surgical treatment if furnished? *Yes.*

17. Give number of any compensation claim filed on account of this disability and place where filed: *C-776 289. Charlotte, N. C.*

18. Give the name of the person named as beneficiary in your application for insurance. *My father.*

19. Have you since changed the beneficiary to some other person? *Yes.* (a) If so, to whom? *My wife, Sudie Tyson.*

20. Date and place of last marriage: *Fayetteville, N. C., December 25, 1925.*

21. Give name and address of each of your parents living: *Both parents dead.*

22. Has either you or your wife been previously married? *No.* (a) If so, state when and how former marriages of either were terminated ——.

I do solemnly swear that the foregoing statements are true to the best of my knowledge and belief.

(S.) Herbert Lester Tyson.
(Claimant's name in full)

Subscribed and sworn to before me this 2 day of July, 1931. (S.) J. Lacy Armstrong, Notary Public. (Impression of seal.) My commission expires December 7, 1931.

We, the undersigned, severally solemnly swear that we are well acquainted with the claimant whose name is subscribed above, and that we have read the statements made

herein and the facts as stated are true to the best of our knowledge and belief.

[fol. 20] (S.) P. V. Holland (Signature of witness) St. Paul, N. C. (Address of witness)

(S.) J. G. Riddle (Signature of witness) St. Paul, N. C. (Address of witness)

Subscribed and sworn to before me this 2 day of July, 1931. (S.) J. Lacy Armstrong, Notary Public. (Notarial seal.) (Impression of seal here.) My commission expires December 7, 1931.

[fol. 21] EXHIBIT C

(Copy)

November 12, 1932.
FDBC
c-776, 289

Mr. Herbert L. Tyson,
R. F. D. #7,
Fayetteville, North Carolina.

DEAR SIR:

This is with further reference to the above entitled claim. You are informed that a decision was rendered on Nov. 7, 1932, by the Insurance Claims Council to the effect that the evidence is not sufficient to establish as a fact that the former insured was totally and permanently disabled at a time when the contract of insurance was in force, and therefore the claim has been denied.

You may consider such denial final for the purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended.

If you accept the denial of the claim by the Council as final, the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C., to your last address of record.

The case folder is being forwarded to the Veterans' Administration at Charlotte, North Carolina. Any further

inquiries concerning your claim should be directed to that office.

By direction, H. L. McCoy, Director of Insurance.

Insurance Form 909.

[fol. 22] In United States District Court

[Title omitted]

Order Allowing Bill of Exceptions—Filed Nov. 28, 1934

Upon the signing of judgment in this cause, the plaintiff in open Court objected and excepted, and gave notice of appeal to the United States Circuit Court of Appeals. Under date of October 20th, 1930, a consent order was filed allowing the defendant until November 20th, 1934, to serve, have settled and allowed his bill of exceptions, and otherwise perfect his appeal to the Circuit Court of Appeals.

The plaintiff has this day filed petition for appeal and an order was this day signed allowing the appeal, and at the same time citation was issued and assignments of error were filed in apt time.

The plaintiff by his attorneys this day presents his bill of exceptions which were taken to the sundry actions and rulings of the Court during the trial of this cause, and requests that it be approved; and the same is hereby allowed and in every respect approved, and is signed, sealed, enrolled and settled, and it is hereby ordered to be made a part of the record on this case on appeal.

This 15th day of November, 1934.

I. M. Meekins, U. S. District Judge.

[fol. 23] In United States District Court

[Title omitted]

Assignment of Error—Filed Nov. 28, 1934

Now comes Herbert Lester Tyson, plaintiff in the above entitled cause, through J. M. Broughton and H. C. Blackwell, his attorneys, in connection with his appeal and petition therefor, and makes the following assignment of error

which he avers occurred during the trial of said cause in the Honorable District Court for the Eastern District of North Carolina:

1. The Court erred in signing the judgment rendered herein, in which judgment it is adjudged and decreed that the Court has not acquired jurisdiction of this cause, and that the same be accordingly dismissed.

For which error, plaintiff prays that said judgment of the United States District Court, for the Eastern District of North Carolina, dated the 11th day of September, 1934, in the above entitled action, be reversed and the cause remanded with direction to the District Court for the Eastern District of North Carolina, and for such other and further relief as may be proper in the premises.

This the 8th day of November, 1934.

Herbert Lester Tyson, by (S.) J. M. Broughton.
(S.) H. C. Blackwell, His Attorneys.

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed Nov. 28, 1934

In the above entitled action, upon the appeal by plaintiff from judgment rendered therein in favor of the defendant, it is stipulated and agreed that the following shall constitute the record of the case on appeal:

(1) Summons.
(2) Complaint.
(3) Answer.
(4) Judgment.
(5) Petition for appeal.
(6) Order allowing appeal.
(7) Bill of exceptions.
(8) Order allowing bill of exceptions.
(9) Citation to defendant.
(10) Assignment of error.
(11) Stipulation of counsel.

This the 15th day of November, 1934.

(S.) J. M. Broughton, H. C. Blackwell, Attorneys for Plaintiff. John H. Manning, Asst. U. S. District Attorney.

[fol. 25] IN UNITED STATES DISTRICT COURT

MEMORANDUM UNDER SECTION 7 OF RULE 14

Petition for Appeal, filed Nov. 28, 1934.

Order allowing appeal and allowing appeal in forma pauperis, filed Nov. 28, 1934.

Citation, dated Nov. 15, 1934, with service of same accepted Nov. 15, 1934, by John H. Manning, Assistant United States Attorney.

Order extending time to prepare Bill of Exceptions, filed Oct. 20, 1934.

IN UNITED STATES DISTRICT COURT

ORDER TO TRANSMIT RECORD

And, thereupon, it is ordered by the Court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit; and the same is transmitted accordingly.

Teste:

S. A. A, lCerk. (Seal of District Court.)

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 26] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 3811

HERBERT LESTER TYSON, Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the District Court of the United States for the Eastern District of North Carolina, at Raleigh

DOCKET ENTRIES

December 7, 1934, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal in forma pauperis, and citation are certified up under section 7 of Rule 14.

Same day, the original order extending the time to prepare bill of exceptions is certified up.

Same day, the appearance of J. Melville Broughton and W. H. Yarborough, Jr. is entered for the appellant.

Same day, two typewritten copies of the transcript of record are filed.

December 10, 1934, the appearance of J. O. Carr, U. S. Attorney, is entered for the appellee.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION OF APPELLANT FOR LEAVE TO PROSECUTE APPEAL IN FORMA PAUPERIS—Filed December 10, 1934

To the Honorable John J. Parker, Senior Circuit Court Judge:

Herbert Lester Tyson, Appellant in the above entitled action now on appeal to the United States Circuit Court of Appeals, Fourth Circuit from judgment rendered in the [fol. 27] United States District Court for the Eastern District of North Carolina, Raleigh Division, respectfully petitions this Honorable Court for an order allowing him to prosecute his said appeal in forma pauperis, and in support of his said petition attaches hereto his affidavit to the effect that he is unable because of his poverty to make any bond or deposit for costs as appellant in said case on appeal.

As will appear from the record the plaintiff, the said Herbert Lester Tyson, was for the same reasons herein set forth, allowed by the District Court to bring his suit originally in forma pauperis.

This the 8th day of December, 1934.

Respectfully submitted, J. Melville Broughton, H. C. Blackwell, Attorneys for Herbert Lester Tyson, Appellant.

IN UNITED STATES CIRCUIT COURT OF APPEALS

AFFIDAVIT OF APPELLANT AS TO POVERTY—Filed December 10, 1934

Herbert Lester Tyson, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action now pending on appeal by him to the Circuit Court of Appeals, Fourth Circuit, from a judgment rendered in favor of the defendant; that he is unable because of his poverty to make any deposit or bond for cost as Appellant in said case on appeal, and that accordingly, it is necessary for him to ask leave of the Court to prosecute such appeal in forma pauperis.

Herbert Lester Tyson.

Sworn to and subscribed before me, this the 12th day of September, 1934. Mary Louisa Williams, Notary Public. (Seal of Notary.) My commission expires May 21, 1936.

[fol. 28] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER ALLOWING APPELLANT TO PROSECUTE APPEAL IN FORMA PAUPERIS—Filed December 11, 1934

Upon the petition and affidavit of the Appellant, by J. M. Broughton and H. C. Blackwell, his attorneys, that he be permitted to prosecute his appeal in this Court in forma pauperis,

It is ordered that the Appellant be, and he is hereby allowed to prosecute his appeal in this Court in forma pauperis, and the cause be heard on the original typewritten transcript of the record.

It is further ordered that the Appellant be, and he is hereby, permitted to file six typewritten copies of his brief instead of twenty printed copies as required by the rules of this Court.

December 11th, 1934.

John J. Parker, Senior Circuit Judge.

December 11, 1934, the appearance of H. C. Blackwell is entered for the appellant.

December 19, 1934, stipulation as to the time for the filing of the respective briefs is filed.

January 29, 1935, the appearance of Wm. B. Snow, Special Assistant to the Attorney General, is entered for the appellee.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MINUTE ENTRY OF ARGUMENT OF CAUSE

January 31, 1935 (January Term, 1935), cause came on to be heard before Parker, Circuit Judge, and McClintic and Hayes, District Judges, and is argued by counsel and submitted.

[fol. 29] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3811

HERBERT LESTER TYSON, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Eastern District of North Carolina, at Raleigh

Argued January 31, 1935. Decided April 2, 1935

Before Parker, Circuit Judge, and McClintic and Hayes, District Judges

W. H. Yarborough, Jr. (H. C. Blackwell and J. M. Broughton on brief) for Appellant, and William B. Snow, Special Assistant to the Attorney General (James O. Carr, U. S. Attorney; Will G. Beardslee, Director, Bureau of War Risk Litigation; Wilbur C. Pickett and Fendall Marbury, Special Assistants to the Attorney General, on brief) for Appellee.

OPINION—Filed April 2, 1935

[fol. 30] PARKER, Circuit Judge:

This is an appeal in a war risk insurance case in which the suit of plaintiff was dismissed for lack of jurisdiction on the ground that it was not instituted within the time required by statute. The suit was instituted November 17, 1932 and asked recovery on a policy of war risk insurance which was kept in force by the payment of premiums until December 1918, the allegation of the petition being that at that time insured was totally and permanently disabled. Insured relied upon the fact that he had filed claim for insurance with the Veterans' Administration to extend the period within which suit might be instituted beyond July 3, 1931, the date upon which it would otherwise have been barred by statute. 38 USCA 445. There is no dispute as to the filing and rejection of the claim, the facts with respect to which are as follows:

On December 2, 1930 the Veterans' Administration wrote a letter to insured advising him that the local rating board was of opinion that he was not entitled to compensation, for the reason that he was not shown to have a service connected disability which disabled him to a compensable degree. With this letter were enclosed forms 526-c and 526-f, which insured was directed to execute and return at once if he desired to apply for a disability allowance. Insured filled in and executed these forms and forwarded them to the Veterans' Administration, by which they were received and filed on December 12, 1930. Form 526-c was an application for disability allowance under Section 200 of the World War Veterans' Act of 1924 as amended July 3, 1930. It contained no statement that insured was or had been totally or permanently disabled or that he made any claim under his policy of war risk insurance. Form 526-f was as follows: "I hereby make formal application for any benefits under the War Risk Insurance Act, as amended, [fol. 31] and the World War Veterans' Act, 1924, as amended, to which it may be found that I am, or have been, entitled. I have not previously made application for the benefits."

On July 2, 1931 insured executed and mailed to the Veterans' Administration a claim for insurance benefits under his policy, claiming that he had been totally and per-

manently disabled since September 10, 1918. This claim was received by the Veterans' Administration on July 3, 1931 and was denied by the director on November 12, 1932. The letter of denial, which was dated November 12, 1932, contained the following statement: "You may consider such denial final for the purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended. If you accept the denial of the claim by the Council as final, the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C. to your last address of record." The date of the Washington postmark on this letter was November 14th and it was received by insured on November 16th, two days being the period usually required for transmission of mail from Washington to the address of the insured. As stated, the suit was commenced by the filing of the petition on November 17th, although service was not made upon the United States Attorney until November 19th.

It is clear, we think, that the claim filed on December 12, 1930 on forms 526-c and 526-f was not a claim for insurance under the war risk insurance policy. The statute with relation to suits on claims under war risk insurance policies (38 UCSA 445) provides, "The term 'claim' as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits". There is nothing in [fol. 32] the claim which alleges permanent and total disability at a time when the contract of insurance was in force, or which shows any intention to claim insurance benefits. See U. S. v. Collins (C. C. A. 4th) 61 Fed. (2d) 1002; Wilson v. U. S. (C. C. A. 10th) 70 Fed. (2d) 176; U. S. v. Peters (C. C. A. 8th) 62 Fed. (2d) 977; U. S. v. Densmore (C. C. A. 9th) 58 Fed. (2d) 748.

Plaintiff must depend, therefore, upon the claim filed with the Veterans Administration on July 3, 1931 to avert the bar of the statute of limitations; and, while the filing of that claim unquestionably tolled the running of the statute until the claim was denied, we do not think that the action was instituted within proper time even when this is

considered. The exact provision with respect to the suspension of the running of the statute is as follows: "This limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director." 38 USCA 445. The running of the statute is suspended when the claim is filed in the Bureau of War Risk Insurance of the Veterans Administration, not when it is deposited in the mails. Weaver v. U. S. (C. C. A. 4th) 72 Fed. (2d) 20. And it is denied by the director when he takes action denying it, not when notice of denial is received by the insured. Corn v. United States (C. C. A. 10th) 74 Fed. (2d) 438; U. S. v. Thomson (C. C. A. 10th) 71 Fed. (2d) 860; U. S. v. Gower (C. C. A. 10th) 71 Fed. (2d) 366; Stallman v. U. S. (C. C. A. 8th) 67 Fed. (2d) 675; Roberts v. U. S. (C. C. A. 10th) 66 Fed. (2d) 273; Hunnewell v. U. S. 2 Fed. Supp. 389; Hipkins v. U. S. 1 Fed. Supp. 505. We have considered the reasoning to the contrary of this last proposition in Creasy v. U. S. 4 Fed. Supp. 175, but we are not convinced by it. The language of the statute is clear and unambiguous. The statute is "suspended for the period elapsing between the filing in the Bureau of the [fol. 33] claim sued upon and the denial of said claim by the director". Only Congress can prescribe the terms upon which the government may be sued; and when it has done so clearly and unequivocally, neither the bureau charged with the administration of the act nor the courts may add to or take from these terms. Congress might have provided for the suspension of the statute until the insured should be notified of the rejection of his claim. It has not done so, but has provided for suspension only during the period between the filing of the claim and its denial by the director.

It follows that the running of the statute was suspended from July 3, 1931 to November 12, 1932, a period of one year, four months and nine days, applying the well settled rule of excluding the first day and including the last. This period is to be added to the period embraced within the statute, which would otherwise have expired on July 3d; for as said by Judge Chesnut in the Hipkins case, supra, "The suspension of a statute of limitations for a certain period is, in effect, 'time taken out,' for that period and adds the same period of time to the limitation provided in the statute." The period of limitations expired, then, on November 12, 1932, and as suit was not instituted until November

17th, it was clearly barred when instituted. The same result follows if the date of receipt of notice by the insured be taken as the last date of the period of suspension; for in that case the time for bringing suit would have expired on November 16th, the day before the suit was instituted. Only by counting the first day as well as the last in computing the period of suspension could the period of limitations be extended to November 17th; and all of the cases in which the question is involved hold that this is not proper. Thus in Corn v. U. S. supra, claim was filed on July 2, 1931, and it was held that only one day remained of the period of limitations. In Walton v. U. S. (C. C. A. 8th) 73 Fed. (2d) 15, claim was filed on June 22nd and it was held that only [fol. 34] eleven days remained. In U. S. v. Gower, supra, claim was filed on June 20th, and it was held that only thirteen days remained. In U. S. v. Thomson, supra, and in Stallman v. U. S., supra, claims were filed on June 27th in each case, and in each case it was held that only six days remained.

For the reasons stated, the suit was properly dismissed as not having been commenced within the time limited by statute and the judgment appealed from will be affirmed. Affirmed.

[fol. 35] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3811

HERBERT LESTER TYSON, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Eastern District of North Carolina

JUDGMENT—Filed and Entered April 3, 1935

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

April 3, 1935.

John J. Parker, Senior Circuit Judge.

RECITAL AS TO ISSUANCE OF MANDATE, ETC.

On another day, to-wit, May 4, 1935, the mandate of this Court in this cause is issued and transmitted to the United States District Court at Raleigh, North Carolina, in due form.

Same day, the original petition for appeal, order allowing appeal, and order extending the time for the preparation of the bill of exceptions are returned to the Clerk of the United States District Court at Raleigh, North Carolina.

[fol. 36] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,746. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 192. Herbert Lester Tyson, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed June 29, 1935. Term No. 192 O. T. 1935.

FILE COPY

JUN 29 193

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 192

HERBERT LESTER TYSON,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. MELVILLE BROUGHTON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 192

HERBERT LESTER TYSON,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

The petition of Herbert Lester Tyson respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This cause involves only questions of law arising out of the legal construction and effect of Chapter 320, Section 19, 43 Stat. 612 (Title 38 U. S. C. A. Sec. 445), known as the

War Risk Insurance Act, as amended May 29, 1928, #1, 45 Stat. 964; July 3, 1930, c. 849, #4, 46 Stat. 992.

The pertinent section of the statute is:

> "No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date, and no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: Provided, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: Provided further, That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. * * *"

This action was instituted on November 17, 1932, and asked for a recovery on a policy of War Risk Insurance. The suit was dismissed by the District Court for lack of jurisdiction on the grounds that the suit was not instituted within the time required by statute.

The facts with respect to the filing and rejection of the claim sued upon are as follows:

On December 2, 1930, in response to a request of the insured the Veterans Administration wrote a letter to the insured advising him that the local rating board was of the opinion that he was not entitled to compensation. With this letter were enclosed forms 526-c and 526-f, which insured was directed to execute and return if he desired to apply for disability allowance. Insured executed and forwarded these forms to the Veterans Administration by which they were filed on December 12, 1930.

On July 2, 1931, insured executed and mailed to the Veterans Administration a claim on Form 579 (Exhibit B) for insurance benefits under his policy, claiming that he had been totally and permanently disabled since September 10, 1918. This claim was filed in the Veterans Bureau on July 3, 1931. The director by letter dated November 12, 1932, denied the claim and advised the insured:

> "You may consider such denial final for the purposes of instituting suit under section 19 of the World War Veterans Act, 1924, as amended. If you accept the denial of the claim by the Council as final, the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C. to your last address of record."

This letter bore a Washington, D. C. post mark of November 14, 1932, and was received by the insured at his home on November 16, 1932. The suit was commenced in the District Court of the United States for the Eastern District of North Carolina, Raleigh Division, on November 17, 1932.

Upon the foregoing facts the District Court dismissed the action for lack of jurisdiction and the Circuit Court of Appeals affirmed the judgment of the District Court. The Circuit Court held that the claim is denied by the director "when he takes action denying it, not when notice of the denial is received by the insured."

Tyson v. *United States,* 76 F. (2d) 533.

The Circuit Court further held that if the date of receipt of the letter by the insured be taken as the last date of the suspension of the statute of limitations, the suit was properly dismissed as the time for bringing the suit expired on the same date.

B.

Reasons Relied on for the Allowance of the Writ.

Petitioner relies upon the following reasons for the issuance of the writ:

1. The Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by the Supreme Court of the United States.

2. The Circuit Court of Appeals has decided a Federal question in conflict with the applicable decisions of the Supreme Court of the United States.

3. The decision of the Circuit Court of Appeals in the instant case conflicts with its own decision in *Weaver* v. *U. S.*, 72 F. (2d) 20.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 3811, *Herbert Lester Tyson, Appellant,* v. *United States of America, Appellee,* and that the said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

HERBERT LESTER TYSON,
By J. MELVILLE BROUGHTON,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 192

HERBERT LESTER TYSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit dated April 2, 1935, is reported in 76 F. (2d) 533, and is found at pages 21 to 25 of the record.

II.

Jurisdiction.

1. Jurisdiction is sustained by Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925,

Chapter 229, Section 1, 43 Stat. at L. 938; U. S. C. A. Title 28, Section 347.

2. Judgment of the court below was entered under date of April 2, 1935, less than three months prior to the filing of this petition for writ of certiorari.

3. The suit was brought under authority of Chapter 320, Section 19, 43 Stat. 612; U. S. C. A. Title 38, Section 445, as amended Section 1, 45 Stat. 964, Chapter 849, Section 4, 46 Stat. 992.

4. The nature of the case and the ruling of the court below are such as to bring the case within the jurisdictional provisions relied on.

5. Cases believed to sustain jurisdiction:

U. S. v. *Rimer,* 31 S. Ct. 596; 220 U. S. 547, 55 L. Ed. 578;

Crouch v. *U. S.,* 45 S. Ct. 71; 266 U. S. 180, 69 L. Ed. 233.

III.

Statement of the Case.

A full statement of the case has been given under the heading A in the petition, and for the sake of brevity the statement is not repeated at this point.

IV.

Specifications of Error.

1. The Circuit Court erred in holding that the suspension of the statute of limitations ceased upon denial of the claim by the director and not that it ceased upon receipt of notice by the insured of such denial.

2. The Circuit Court erred in holding that the insured should have instituted suit on the same day on which he received notice of the denial.

3. The Circuit Court erred in reaching a determination which conflicts directly with the decision in *Weaver* v. *U. S.*, 72 F. (2d) 20 and conflicts in principle and application with decisions of the same and other circuits.

V.

ARGUMENT.

1. The Circuit Court erred in holding that the suspension of the statute of limitations ceased upon denial of the claim by the director and not that it ceased upon receipt of notice by the insured of such denial.

As set forth in the record herein the decision of the Circuit Court of Appeals held that suspension of the statute of limitations ceased upon the denial of the claim and not when the insured received notice of the decision of the director.

In order to prosecute his suit it was necessary that petitioner file with the Bureau his claim for insurance benefits under his policy of War Risk Insurance. Upon a denial of this claim by the director or someone acting in his name the insured was authorized to commence suit in the United States District Court against the United States. The action of the director upon the claim was a condition precedent to instituting a suit under the provisions of this statute. Section 1 of the statute provides:

> "In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action may be brought against the United States either in the Supreme Court of the District of Columbia or in the District Court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies."

"Disagreement" is defined to mean "a denial of the claim by the director or someone acting in his name." U. S. C. A. Title 38, section 445.

In construing these sections of the statute the courts have been uniform in holding that disagreement was a condition precedent to instituting the action.

> "It is clear that the District Court has no jurisdiction to entertain the suit in the absence of proof of the existence of the disagreement prior to the bringing of the suit."
>
> *U. S.* v. *Collins* (C. C. A. 4th) 61 F. (2d) 1002.
> *U. S.* v. *Knott* (C. C. A. 6th) 69 F. (2d) 907.
> *Wilson* v. *U. S.* (C. C. A. 10th) 70 F. (2d) 176.

In the absence of the letter of denial from the director of the Bureau petitioner would have been unable to show the required disagreement. The disagreement forms the actual basis of the suit and could only be shown by the letter of denial from the director.

Congress in defining disagreement and making it a condition precedent to instituting a suit on these policies of insurance could not have intended that the disagreement became a fact at the instant of the denial by the director. Such an intention would have limited the application of this statute to such veterans who only could have acquired knowledge of the act of the director and would have rendered null the benefits intended.

The duty of beginning the suit did not arise, therefore, until notice of the denial had been communicated to the insured. Without such notice there could have been no disagreement.

> "If the act of denial of the claim imposes upon the veteran the condition that he must sue within a limited time thereafter, surely, he cannot be expected to comply with this condition until such time as he has knowledge of the denial of his claim. In fact he cannot sue until

he knows that his claim has been denied and is no longer under consideration at the Bureau. Only after he has received notice of the denial can he allege the disagreement which is essential to the maintenance of a suit. The claim is to be taken as denied on the date when the claimant received the letter informing him of denial."

Creasy v. *U. S.* (D. C. Va.) 4 F. Supp. 175.
Albek v. *U. S.* (D. C. N. Y.) 4 F. Supp. 1020.

Any other interpretation of the statute in question would defeat the very objects sought to be obtained. Under the rules of construction of statutes it is settled that "the intention of the lawmaker is to be deducted from a view of every material part of the statute * * *."

Kohlsaat v. *Murphy,* 96 U. S. 153; 24 L. Ed. 844.

Construing the section relating to the suspension of the statute of limitations with the section requiring disagreement as a condition precedent to instituting the suit, it clearly appears that Congress intended that the insured should have notice of the denial.

The Court is not confined to a literal reading of the statute, but "may consider its objects and purposes, the things with which it is dealing and the condition of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact."

American Tobacco Co. v. *Werckmeister,* 207 U. S. 284; 52 L. Ed. 208.

Statutes are not construed so as to result in inequalities or absurdities, and to impose upon the insured the necessity of showing disagreement and at the same time denying the means of obtaining knowledge of the disagreement

within the time limited would result in inequalities and produce an absurdity.

Sorrells v. *U. S.*, 287 U. S. 445; 77 L. Ed. 419.
Bloomer v. *McQuan,* 14 Howard 537; 14 L. Ed. 533.
Royal Indemnity Co. v. *American Bond & Mtg. Co.*, 289 U. S. 167; 77 L. Ed. 1100.

The same court held in *Weaver* v. *U. S.* (C. C. A. 4th) 72 F. (2d) 20, that "the statute of limitations was suspended for the number of days prior to and including July 3, 1931, that the claim was pending in the Bureau, and the plaintiff was entitled to bring suit within that number of days after notice of disallowance of his claim by the bureau." The decision in the *Weaver* case was based on facts similar to these in the instant case except that plaintiff in the *Weaver* case failed to bring his suit until several days after receipt of notice of denial.

It has been held in this Court that great weight is to be given to the construction consistently given to a statute by the department charged with its administration unless the construction is clearly wrong or unless a different construction is plainly required.

U. S. v. *Jackson,* 280 U. S. 183; 74 L. Ed. 361, and cases therein cited.

The Veterans Bureau in its letter to petitioner stated that the suspension of the statute would cease upon the denial by the director plus the number of days usually required by the Post Office Department to transmit the letter to insured's last known address. Similar statements were contained in letters of denial in other cases arising under this statute. It is plain therefore that the Veterans Bureau construed the statute so as to allow notice to the insured before the suspension should cease.

It is to be observed that in this case the letter of denial although dated November 12, 1932, was postmarked November 14th, 1932. This lapse of two days which in the opinion of the Circuit Court marked the expiration of insured's right to proceed under the statute certainly is not chargeable to insured. The construction of this statute as given by the Circuit Court in this case results in a grave injustice to those whom the statute should benefit.

2. The Circuit Court erred in holding that the insured should have instituted the suit on the same day on which he received notice of the denial.

It is submitted that under any rule for computing time that insured had one day after receipt of notice in which to commence his suit. The statute clearly includes July 3, 1931, as one of the days to be included and if the claim is filed on July 3, 1931, then insured had one day after receipt of the letter of denial in which to commence his suit. It is only by excluding July 3, 1931, that any other conclusion may be reached. Even if fractions of days be included in the calculation it is contended that insured brought his suit within the time contemplated by the statute.

The *Weaver* case, hereinbefore cited, clearly holds that July 3, 1931, is to be included in calculating the time within which insured must commence his suit. And in that case the Court indicated that if the claim had been filed on July 3, 1931, the plaintiff would have had one day after receipt of notice of denial in which to institute his suit.

3. The Circuit Court erred in reaching a determination which conflicts directly with its decision in Weaver v. U. S., 72 F. (2d) 20, and conflicts in principle and application with decisions of the same and other circuits.

It is submitted that the decision of the Circuit Court in the instant case is clearly in conflict with the decision of the same court in the *Weaver* case. Certainly as to time when the suspension of the statute of limitations ceased the two cases are in conflict. And by direct implication the two cases are in conflict with respect to the number of days remaining to the veteran in which to institute suit after notice of the disallowance.

It is earnestly contended that an application of the decision in the *Weaver* case to the facts in this case can only result in a reversal of the decision of the Circuit Court. The decisions in the instant case are not in accord either with the decisions of this Court or with the decisions of the Circuit Courts of Appeals as to the proper construction of the statute in question.

Conclusion.

It is therefore respectfully submitted that this Court should grant the petition for the writ of certiorari in order that it may review the decision of the Circuit Court of Appeals and finally reverse it and remand this cause to the District Court for trial upon its merits.

Respectfully submitted,

J. MELVILLE BROUGHTON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 192

HERBERT LESTER TYSON,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONER.

J. MELVILLE BROUGHTON,
Counsel for Petitioner.

WM. H. YARBOROUGH, JR.,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 192

HERBERT LESTER TYSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF OF PETITIONER.

I.

Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit, dated April 2, 1935, is reported in 76 F. (2d) 533, and is found at pages 21 to 25 of the record.

II.

Jurisdiction.

Jurisdiction is set forth in the Brief in Support of Petition for Writ of Certiorari herein.

III.

Statement of the Case.

This action was instituted by Herbert Lester Tyson for the recovery of benefits under a policy of War Risk Insurance issued to him by the United States of America.

On December 2, 1930, in response to a request of the insured the Veterans Administration wrote a letter to the insured advising him that the local rating board was of the opinion that he was not entitled to compensation. With this letter were enclosed forms 526-c and 526-f, which the insured was directed to execute and return if he desired to apply for disability allowance. Insured executed and forwarded these forms to the Veterans Administration by which they were filed on December 12, 1930.

Thereafter, on July 2, 1931, insured executed and mailed to the Veterans Administration a claim on Form 579 (Exhibit "8") for insurance benefits under his policy of insurance, alleging total and permanent disability under the policy. This claim was filed in the Veterans Bureau on July 3, 1931. The director, by letter dated November 12, 1932, denied the claim and advised the insured:

> "You may consider such denial final for the purposes of instituting suit under section 19 of the World War Veterans Act, 1924, as amended. If you accept the denial of the claim by the Council as final the suspension of the Statute of Limitations provided by section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C., to your last address of record."

This letter was post-marked in Washington, D. C., on November 14, 1932, and was received by the insured at his last address of record on November 16, 1932. The follow-

ing day suit was commenced in the District Court of the United States for the Eastern District of North Carolina, Raleigh Division.

Upon the foregoing facts the District Court dismissed the action for lack of jurisdiction and upon appeal by the insured the Circuit Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court. The Circuit Court held that the claim is denied by the director "when he takes action denying it, not when notice of the denial is received by the insured."

The Circuit Court further held that if the date of receipt of the letter by the insured be taken as the last date of the suspension of the statute of limitations, the suit was properly dismissed as the time for bringing the action expired on the date the insured received the denial.

A petition for a wit of certiorari was thereafter filed in this Court which petition was allowed.

IV.

Specifications of Error.

1. *The suspension of the Statute of Limitations provided in Chapter 320, Section 19, 43 Stat. 612 (Title 38, U. S. C. A. Sec. 445, as amended) did not expire upon action by the director denying the claim, but upon the expiration of the number of days usually required by the post office department for the transmission of mail from Washington, D. C., to the insured's last address of record.*

2. *The filing of the claim in the Bureau on July 3, 1931, suspended the running of the Statute of Limitations against instituting suit for one day following receipt of notice of denial by the insured.*

VI.

ARGUMENT.

1. The suspension of the Statute of Limitations provided in Chapter 320, Section 19, 43 Stat. 612 (Title 38, U. S. C. A., Sec. 445, as amended), did not expire upon action by the director denying the claim, but upon the expiration of the number of days usually required by the Post Office Department for the transmission of mail from Washington, D. C., to the insured's last address of record.

As set forth in the record the Circuit Court of Appeals held that the suspension of the statute of limitations expired when the director took action denying the claim and not when the notice of denial is received by the insured.

In order to prosecute his suit it was necessary for the insured to show the existence of disagreement between the Bureau and himself. Disagreement arose when the Director of the Bureau denied insured's claim for insurance benefits. This denial was a prerequisite to maintaining his action and the denial could only be shown from the letter of the director.

> "It is clear that the District Court has no jurisdiction to entertain the suit in the absence of proof of the existence of the disagreement prior to the bringing of the suit."
>
> *U. S.* v. *Collins* (C. C. A. 4th) 61 F. (2d) 1002;
> *U. S.* v. *Knott* (C. C. A. 6th) 69 F. (2d) 907;
> *Silson* v. *U. S.* (C. C. A. 10th) 70 F. (2d) 176.

The duty of beginning the suit did not arise until notice of the denial had been communicated to the insured. Without such notice of denial there could have been no proof of

disagreement and the action could not have been maintained.

> "If the act of denial of the claim imposes upon the veteran the condition that he must sue within a limited time thereafter, surely, he cannot be expected to comply with this condition until such time as he has knowledge of the denial of his claim. In fact he cannot sue until he knows that his claim has been denied and is no longer under consideration at the Bureau. Only after he has received notice of the denial can he allege the disagreement which is essential to the maintenance of a suit. The claim is to be taken as denied on the date when claimant received the letter informing him of denial."
>
> *Creasy* v. *U. S.* (D. C. Va.) 4 F. Supp. 175.
> *Albek* v. *U. S.* (D. C. N. Y.) 4 F. Supp. 1020.

In a case similar to the one at bar in the Fifth Circuit the United States contended that the denial became effective on the date the letter was dated. The Circuit Court held that this position was not consistent with the law:

> "It is to be noted that under the statute the period of extension begins with the 'filing in the bureau of the claim sued upon' and ends, not with the order denying the claim, but with 'the denial of said claim by the director.' It well may be supposed that in enacting the statute the lawmakers had in mind the methods pursued in the bureau in dealing with such claims, that claims are transmitted by the claimants from all parts of the country, and that a claimant first learns of the bureau's action on his claim when he is informed of that action by the bureau, and that communications between claimants and the bureau generally are by mail. Nothing in the language of the statute indicates a purpose to make a denial of the claim effective prior to delivery of notice of it at the place of claimant's address.
>
> *U. S.* v. *Walker* (C. C. A. 5th) 77 F. (2d) 415.

In the case at bar the director in the letter of denial stated:

> "If you accept the denial of the claim by the Council as final, the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C. to your last address of record."

The above quoted portion of the letter of denial is almost identical with the language of a regulation of the Insurance Claims Council (Decisions Insurance Claims Council, Nos. 3106, 3107, November 1, 1931). Therefore it is clear that the department charged with the administration of the law construed the statute as contended by appellant. This Court has held that great weight should be given the construction consistently given a statute by the department charged with its administration unless the construction is clearly wrong or unless a different construction is plainly required.

U. S. v. *Jackson*, 280 U. S. 183, 74 L. Ed. 361.

It could not have reasonably been contemplated that the suspension of the statute of limitations would cease prior to notice of the denial. It was certainly not contemplated that the insured should be able to commence suit on his claim on the grounds that a disagreement existed prior to receipt of the letter from the director informing him of the existence of a disagreement. The suit was predicated upon the existence of a disagreement and until claimant had notice of its existence he could not commence the action.

U. S. v. *Walker, supra.*

The purpose of the statute was to compel the insured to exhaust his administrative remedies before resorting to

the courts. A suit would not lie until the insured could prove that he had exhausted these remedies and that there existed a disagreement between insured and the Bureau. This disagreement did not exist until notice of the denial was communicated to the insured.

Weaver v. *U. S.* (C. C. A. 4th) 72 F. (2d) 20.

The court is not confined to a literal reading of the statute, but may consider its objects and purposes, the things with which it is dealing and the condition of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact.

American Tobacco Co. v. *Werckmeister,* 207 U. S. 284, 52 L. Ed. 208.

It is to be observed that although the letter of denial is dated November 12, 1932, it was not actually mailed until November 14, 1932, as shown by the post mark. This lapse of two days cannot be charged to any neglect on the part of the appellant, and yet it is contended that by reason of an act purely within the control of the Bureau insured's suit is barred. Such a construction results in a grave injustice to those whom the statute was specially designed to benefit.

2. The filing of the claim in the Bureau on July 3, 1931, suspended the running of the Statute of Limitations against the institution of suit for one day following receipt of notice of denial of the claim by the insured.

In the opinion herein the Circuit Court held that even if the claim be treated as denied on the date of receipt,

November 16, 1932, the suit was nevertheless barred by the statute. The statute provides:

> "This limitation is suspended for the period elapsing between the filing in the Bureau of the claim sued upon and the denial of said claim by the director."
> 38 U. S. C. A. 445.

The claim was filed in the Bureau on July 3, 1931, the last day on which such claims might be filed. Thereupon the running of the statute of limitations was suspended until there was a denial of the claim by the director and there remained to the veteran the unexpired portion of the time he had in which to file claim. Certainly there remained to him the unexpired portion of July 3, 1931, and such unexpired portion remained after notice of denial. Unless fractions of a day are to be regarded in computing the time remaining then it must be held that one day remained. Ordinarily where an act is required to be done on a date and no question of priority arises fractions of a day are not computed but the entire day is counted.

Gill v. *Bank of U. S.*, 12 Wheat 511, and notes to 49 L. R. A. 193, and 1 L. R. A. (N. S.) 835.

> "When the period allowed for doing an act is to be reckoned from the making of a contract or the happening of any other event, the day on which the event happened may be regarded as an entirety, or a point of time and so may be excluded from computation."
> *Burnet* v. *Willingham Loan & Trust Co.*, 282 U. S. 438, 440; 75 L. Ed. 449, 450.

If the day on which the insured filed his claim in the Bureau is excluded from the computation then one day remained. Otherwise instead of the statute of limitations barring a claim "one year after July 3, 1930," (38 U. S. C. A. 445) the claim would be barred on July 3, 1931.

This Court has previously held that in such cases the entire day would be allowed for filing the claim or suit.

Bonwit Teller & Co. v. *U. S.*, 283 U. S. 258, 265, 75 L. Ed. 1018, 1022.

Conclusion.

It is therefore respectfully submitted that under the decisions herein cited the insured's suit was not barred by the statute of limitations but was begun within the time allowed by the statute, and therefore the decision of the Circuit Court should be reversed.

Respectfully submitted,

J. Melville Broughton,
Counsel for Appellant.

Wm. H. Yarborough, Jr.
Of Counsel.

APPENDIX.

Pertinent Statutes Quoted and Relied Upon.

38 U. S. C. A. 445 (43 Stat. 612, 43 Stat. 1302, 45 Stat. 964, 46 Stat. 992): *Actions on claims; jurisdiction; parties; procedure; limitations.* In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28, and section 765 of Title 28 so far as applicable. All persons having or claiming to have an interest in such insurance may be made parties to such suit and such as are not inhabits of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct. In all cases where the bureau acknowledges the indebtedness of the United States upon any such contract of insurance and there is a dispute as to the person or persons entitled to payment, a suit in the nature of a bill of interpleader may be brought by the bureau in the name of the United States against all persons having or claiming to have any interest in such insurance in the Supreme Court of the District of Columbia or in the district court in and for the district in which any such claimants reside: Provided, That no less than thirty days prior to instituting such suit the bureau shall mail a notice of such intention to each of the persons to be made parties to the suit. The circuit courts of appeal and the Court of Appeals of the District of Columbia shall respectively exercise appellate jurisdiction and except as provided in sections 346 and 347 of Title 28, the decree of the circuit

courts of appeals and the Court of Appeals of the District of Columbia shall be final.

No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date, and no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: Provided, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded; Provided further, That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the bureau shall have three years in which to bring suit after the removal of their disabilities. If suit is seasonably begun and fails for defect in process or for other reasons not affecting the merits, a new action, if one lies, may be brought within a year though the period of limitations has elapsed. Judgments heretofore rendered against the person or persons claiming under the contract of war risk insurance on the ground that the claim was barred by the statute of limitations shall not be a bar to the institution of another suit on the same claim. No state or other statute of limitations shall be applicable to suits filed under this section.

In any suit, action, or proceeding brought under the provisions of this chapter, subpoenas for witnesses who are required to attend a court of the United States in any district may run into any other district: Provided, That no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the court being first had upon proper application and cause shown. The word "district" and the words "district court" as used herein shall be

construed to include the District of Columbia and the Supreme Court of the District of Columbia.

Attorneys of the bureau when assigned to assist in the trial of cases, and employees of the bureau when ordered in writing by the director to appear as witnesses shall be paid the regular travel and subsistence allowance paid to other employees when on official travel status.

Part time and fee basis employees of the bureau, in addition to their regular travel and subsistence allowance when ordered in writing by the director to appear as witnesses in suits under this section, may be allowed, within the discretion and under written orders of the director, a fee in an amount not to exceed $20 per day.

Employees of the United States Veterans' Bureau who are subpœnæed to attend the trial of any suit, under the provisions of this chapter, as witnesses for plaintiffs shall be granted official leave for the period they are required to be away from the bureau in answer to such subpœnas.

The term "claim" as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits and the term "disagreement" means a denial of the claim by the director or some one acting in his name on an appeal to the director. This section, as amended, with the exception of this paragraph, shall apply to all suits now pending against the United States under the provisions of the War Risk Insurance Act, as amended, or this chapter.

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No. 192

In the Supreme Court of the United States

OCTOBER TERM, 1935

HERBERT LESTER TYSON, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 21–25) is reported in 76 F. (2d) 533.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 3, 1935 (R. 25). The petition for a writ of certiorari was filed June 29, 1935, and was granted October 14, 1935 (R. 26). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the instant suit was begun within the time prescribed by Section 19 of the World War Veterans' Act, 1924, as amended.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra,* pp. 23–27.

STATEMENT

The petitioner brought suit in the District Court of the United States for the Eastern District of North Carolina to recover total permanent disability benefits under a contract of war-risk term insurance issued to him during his service in the United States Army (R. 2–4). The petition was filed November 17, 1932, and it was alleged therein that total permanent disability had existed ever since the petitioner's discharge from the Army on December 18, 1918, nearly fourteen years prior to the time when he filed suit (R. 2, 3–4).

The respondent filed an answer denying the allegations of disability, and also moved to dismiss the action for want of jurisdiction in that "the suit was not instituted within the time in which the United States has consented to be sued, as prescribed by statute" (R. 5–6). The trial court made findings of fact and entered judgment for the defendant dismissing the suit (R. 6–7) after considering certain undisputed evidence which may be briefly summarized as follows:

Prior to making claim for insurance benefits the petitioner had corresponded with the Veterans' Administration and had filed certain forms relating to compensation and disability allowances not here material, as it is not here contended that such applications related to the insurance claim (R. 9–12).

On July 2, 1931, the plaintiff signed and executed Form 579 of the Veterans' Administration (R. 12–15), which was a form designed for claims for permanent total disability benefits under insurance policies. This form was received by the Veterans' Administration on July 3, 1931 (R. 7).

On November 16, 1932, the plaintiff received the following letter (R. 7), dated November 12, 1932, from H. L. McCoy, Director of Insurance of the Veterans' Administration (R. 15–16):

> This is with further reference to the above-entitled claim. You are informed that a decision was rendered on November 7, 1932, by the Insurance Claims Council to the effect that the evidence is not sufficient to establish as a fact that the former insured was totally and permanently disabled at a time when the contract of insurance was in force, and therefore the claim has been denied.
>
> You may consider such denial final for the purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended.

> If you accept the denial of the claim by the Council as final, the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C., to your last address of record.
>
> * * * * *

The envelope containing the letter was postmarked at Washington November 14, 1932 (R. 7).

The petition was filed in this case and a summons issued on November 17, 1932 (R. 1–2). A copy of the petition was served on the United States Attorney on November 19, 1932 (R. 2) and the summons and return filed in the court on November 23, 1932 (R. 1).

The Circuit Court of Appeals held that the suit was properly dismissed as not having been commenced within the time limited by statute, and affirmed the judgment (R. 22–26).

SUMMARY OF ARGUMENT

The petitioner seeks a construction of Section 19, World War Veterans' Act, as amended, which would extend the proviso suspending the limitation period during the pendency of a claim in the Veterans' Bureau so that the suspension would end not with the denial but with the notification of the claimant. Because the statute specifically states that the suspension ends with the denial of the

claim and fails to provide for any additional period for notification, three Circuit Courts of Appeals have held against the construction sought. The decisions to the contrary appear to be at variance with numerous holdings of this Court that statutes dealing with the relaxation by the United States of its sovereign immunity from suit are to be strictly construed. One decision of particular pertinency to the question here involved is *United States* v. *Michel,* 282 U. S. 656, as it was there held that a limitation on suits to recover internal-revenue taxes could not be extended by implication to include notification of disallowance of the claim for refund even though the statute required the Commissioner to notify the taxpayer.

Congressional committee reports relating to the statute state that the suspension ends on the "date of disallowance of the claim by the director", and if it had been in the contemplation of Congress that the suspension period of Section 19 should not end until notice of disallowance was given it would seem that the desirability of specifying as to the manner and time of notice would have been apparent. The failure, therefore, of Congress to provide other than that the period ends with denial may be taken as evidencing a purpose contrary to the petitioner's contention.

The bureau charged with the administration of the statute has construed the term "denial" to mean the act of disallowance rather than the act of

notification, so that regulatory provisions extending the suspension period to include the sending of notice of rejection would appear to be without statutory authority.

But in any event petitioner's suit was not timely instituted. Having delayed the filing of his claim until the last day allowed by the statute, he was under the necessity of bringing suit on the day of denial, for there was no unexpired portion of the limitation to be preserved by the suspension period. This he did not do.

Furthermore, as he failed to comply with all the conditions of Sections 762 and 763 of Title 28, U. S. C., until several days after he had filed his petition, there is authority for holding that his suit was not brought until the requirements of service and return had been met, which would have been too late under any theory of his case.

ARGUMENT

I

THE STATUTORY PROVISION THAT THE SUSPENSION OF A LIMITATION PERIOD ON WAR RISK INSURANCE SUITS SHOULD END WITH DENIAL OF A PENDING CLAIM MAY NOT BE EXTENDED TO ALLOW AN ADDITIONAL PERIOD FOR NOTICE OF THE DENIAL TO BE SENT THE CLAIMANT IN THE ABSENCE OF CLEAR CONGRESSIONAL SANCTION FOR THE EXTENSION

The single question in this case is whether the petitioner brought his suit against the United States within the time permitted by Section 19, *infra,* p. 23, which in part provides:

> No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date * * *: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. * * *

The petitioner alleged in his suit that he became totally and permanently disabled on December 18, 1918, and claimed insurance benefits from that date (R. 3–4). His action instituted in November 1932 was therefore more than six years after the "right accrued for which the claim is made" and more than one year after July 3, 1930. Accordingly, it was barred unless the petitioner could show a period of suspension of the statute sufficient to cover the period between "denial" of the claim and the institution of suit.

It is well settled that "suit must be brought within such length of time following denial of the claim as was equal to the unexpired portion of the limitation when the claim was filed." *Creasy* v. *United States,* 4 F. Supp. 175, 177 (W. D. Va.). Cf.

Hipkins v. *United States*, 1 F. Supp. 505 (D. C. Md.); *Roberts* v. *United States*, 66 F. (2d) 273 (C. C. A. 10th); *Stallman* v. *United States*, 67 F. (2d) 675 (C. C. A. 8th); *United States* v. *Gower*, 71 F. (2d) 366 (C. C. A. 10th); *United States* v. *Thomson*, 71 F. (2d) 860 (C. C. A. 10th); *Weaver* v. *United States*, 72 F. (2d) 20 (C. C. A. 4th); *Corn* v. *United States*, 74 F. (2d) 438 (C. C. A. 10th). Because the six-year period was not here applicable, the only period of limitation which petitioner might claim was unexpired when his claim was filed would be the year allowed from July 3, 1930.

It is apparently conceded by the petitioner that his claim was filed in the Bureau when it was received on July 3, 1931 (Br. pp. 2, 8), and this concession seems required by the decisions.[1]

The petitioner also accepts the conclusion of the Circuit Court of Appeals that the claim was denied by the Director on November 12, 1932 (Br. p. 2).[2] He contends, however, that the filing of the claim

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[1] See *Weaver* v. *United States*, *supra*; *Creasy* v. *United States*, *supra*; *Young* v. *United States*, 5 F. Supp. 500 (D. C. Idaho).

[2] While there is ground for argument that the claim was denied on November 7, 1932, when the decision of the Insurance Claims Council was rendered (R. 15; see *Frederick* v. *United States*, 294 U. S. 695), it is immaterial to the question here presented whether that time or November 12, 1932, be taken as the date of denial of the claim because in either event the limitation period would have expired, unless the petitioner's contentions herein are sustained.

on July 3, 1931, operated to allow him to file suit a day after the expiration of the period of suspension. It is further asserted by the petitioner that the suspension period did not expire with the denial of the claim, but was extended to include the time necessary for transmission through the mails of the notice of disallowance.

To establish that his suit was timely filed we submit that the petitioner was under the necessity of showing (1) that the suit was "brought" on November 17, 1932, although service was not made on the United States Attorney until November 19, 1932, and return filed November 23, 1932; (2) that the filing of his claim on July 3, 1931, did not require the institution of suit on the day of the denial of the claim but that an additional day was allowed; and (3) that the suspension period did not end with the denial of the claim but with the time required for notice thereof to reach the petitioner through the ordinary course of the mails. If any of these contentions fail, the petitioner's timely institution of suit cannot be established.

The first contention of the petitioner, indispensable to any assertion that the suit was timely instituted, is that the suspension of the limitation period did not "expire upon action by the director denying the claim, but upon the expiration of the number of days usually required by the post office department for the transmission of mail from Washington, D. C., to the insured's last address of

record" (Br. p. 3). Such a contention has been rejected by three Circuit Courts of Appeals and a number of District Courts. The Circuit Court of Appeals for the Tenth Circuit has held adversely to petitioner's contention in *United States* v. *Gower*, 71 F. (2d) 366, *supra*, and *Corn* v. *United States*, 74 F. (2d) 438, *supra* (cf. *Roberts* v. *United States*, 66 F. (2d) 273, *supra*); the Circuit Court of Appeals for the Eighth Circuit in *Stallman* v. *United States*, 67 F. (2d) 675, *supra*, and the Circuit Court of Appeals for the Fourth Circuit in the instant case. See also *Hipkins* v. *United States*, 1 F. Supp. 505 (D. C. Md.), *supra*; *Hunnewell* v. *United States*, 2 F. Supp. 389, 392 (D. C. N. H.); and *Harrop* v. *United States*, 10 F. Supp. 753 (D. C. Nebr.).

Admittedly in conflict with the cases cited is the decision of the Circuit Court of Appeals for the Fifth Circuit in *United States* v. *Walker*, 77 F. (2d) 415, in which the view is taken that "Nothing in the language of the statute indicates a purpose to make a denial of the claim effective prior to delivery of notice of it at the place of the claimant's address" (p. 416). In *Baraby* v. *United States*, 1 F. Supp. 443 (D. C. Mont.); *Creasy* v. *United States*, 4 F. Supp. 175 (W. D. Va.), *supra*; and *Albek* v. *United States*, 4 F. Supp. 1020 (E. D. N. Y.), it is indicated that the suspension of the limitation period does not end until actual notice of denial of the claim has been received by the

claimant. Certain language in *Weaver* v. *United States,* 72 F. (2d) 20, *supra,* intimates the same conclusion, although citing with approval the authorities holding otherwise. It should be pointed out that this was an earlier decision by the Circuit Court of Appeals which rendered the decision in the instant case.

But unless Section 19 requires the interpretation that the suspension period is to be extended until notice is given, it is our view that such construction is not permitted, for this Court has said that it is axiomatic in Federal jurisprudence that statutes dealing with the relaxation by the United States of its sovereign immunity from suit are to be strictly construed and the courts may not extend liability to suit beyond what the language of the statute requires. See *United States* v. *Michel,* 282 U. S. 656, 659; *Eastern Transp. Co.* v. *United States,* 272 U. S. 675, 686; *Price* v. *United States,* 174 U. S. 373, 376.

We believe that this Court's decision in *United States* v. *Michel, supra,* is particularly pertinent to the question here involved. There a statute was considered limiting the time within which suit might be brought to recover taxes illegally assessed or collected to two years after the disallowance of the claim by the Commissioner of Internal Revenue and the statute required the Commissioner to notify the taxpayer of disallowance by mail within ninety days. The Commissioner waited three years before notifying the taxpayer, who filed suit within

two years thereafter. It was contended by the taxpayer that the limitation period of the statute did not begin to run against him until after he received notice of the denial and that therefore his suit had been timely filed. This contention was rejected, the Court saying (p. 659):

> While the statute declares that the Commissioner within a specified time shall notify the taxpayer that his claim has been disallowed, it is nowhere stated that the Commissioner's failure to give the notice will in any event operate to extend the time for bringing suit.

and further, on p. 660:

> Having regard to the rule of strict construction to be applied to waivers by the United States of its sovereign immunity from suit, the clause reasonably may be read merely as a direction to the Commissioner to send the notice to claimant without making the failure so to do have the effect of enlarging the period for suing as otherwise definitely prescribed.

It is especially to be noted in the *Michel* case that the statute specifically provided for the notification of disallowance, while in the instant case no such provision is to be found. The significance of the omission of such a provision was commented on by the Circuit Court of Appeals for the Eighth Circuit in *Stallman* v. *United States,* 67 F. (2d) 675, *supra.* It was there said (p. 676):

> The conditions upon which this suit can be maintained against the government are those prescribed by the acts of Congress, and the court may not enlarge the rights accorded. * * * As the statute * * * says nothing about any additional suspension until notice can be brought home to the claimant, it is our clear duty to hold that the suit was barred.

See also *Harrop* v. *United States,* 10 F. Supp. 753, 756 (D. Neb.), *supra.*

The amendment made to Section 19 by the Act of May 29, 1928, c. 875, 45 Stat. 964, contained practically the same language with regard to the period of limitation as the amendment of July 3, 1930, involved in the instant case. Both the House and Senate reports in discussing the proviso dealing with the suspension of the limitation said:

> In computing the limitation period it is provided that the time from the date of filing claim for insurance benefits to *the date of disallowance of the claim by the director,* shall not be included.[3] (Italics ours.)

The reenactment of the proviso in substantially identical language by the amendment of July 3, 1930, presumably intended the same computation of the suspension period and the Committee reports indicate no changed purpose.[4] That purpose, as

[3] Senate Report No. 1297, p. 1, 70th Cong., 1st Sess.; House Report No. 1274, p. 1, 70th Cong., 1st Sess.

[4] Senate Report No. 885, p. 3, 71st Cong., 2d Sess.; House Report No. 874, pp. 6–8, 71st Cong., 2d Sess.

H. R. Conference Report No. 2060, 71st Cong., 2d Sess.

previously stated, was that the suspension should end on the "date of disallowance of the claim by the director" and if it had been in contemplation that disallowance should include the notification of the claimant, it would seem that Congress would have recognized the desirability of providing specifically as to the manner and time of notice. Otherwise uncertainty as to the limitation of the suspension period might be expected, and those decisions which have held notice necessary reveal that confusion exists as to whether actual or constructive notice should be given. Cf. *Creasy* v. *United States,* 4 F. Supp. 175 (W. D. Va.), *supra; Baraby* v. *United States,* 1 F. Supp. 443 (D. C. Mont.), *supra,* and *United States* v. *Walker,* 77 F. (2d) 415 (C. C. A. 5th), *supra.* In the light of the foregoing the failure of Congress to provide that the suspension period should be extended after denial until the claimant was notified of the rejection of his claim is to be taken, we submit, as evidencing a contrary intent. *Girard Trust Co.* v. *United States,* 270 U. S. 163, 169.

The petitioner urges that Veterans' Administration Regulation 3107, *infra,* p. 26, which provides for an extension of the suspension period allowed by Section 19 to include the time required for the notice of denial to be sent the claimant through the mails amounts to an administrative construction of the statute entitled to great weight (Br. p. 6).

Only the term "denial" in the statute could be here open to question and the petitioner overlooks

the fact that the very regulation to which he directs attention clearly expresses the view that the "denial" of a claim occurs before the notice of disallowance provided by the regulation is sent the claimant. While thus construing the denial of the claim to be the act of disallowance, the regulation nevertheless attempts to extend the statutory period of limitation suspension to include the time necessary for notification of the claimant through the mails.

In *Schillinger* v. *United States*, 155 U. S. 163, 166, this Court said in discussing the consent accorded by Congress to suits against the United States:

> *Beyond the letter of such consent*, the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the Government. (Italics ours.)

Also, in *Eastern Transp. Co.* v. *United States*, 272 U. S. 675, 686, it was said that a court should not enlarge the liability of the United States to suit "beyond what the language requires."

If the courts are thus circumscribed within the letter of the consent, *a fortiori* an administrative official would have no greater right to extend the Government's liability to suit. As was said by this Court in *Miller* v. *United States*, 294 U. S. 435, 440, with reference to another Veterans' Administration regulation:

> The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it.

See also *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599.

Presumably the present Congress also holds the view that Section 19 requires such a construction of the word "denial" as would terminate the suspension period with the act of disallowance and not with the receipt of notice. This seems implicit in a Joint Resolution adopted by the 74th Congress (S. J. Res. 65).[5] One purpose of this resolution was stated by the President in his veto memorandum[6] to be the extension of the period of limitation provided by Section 19 to apply where "because of failure to file claim at an earlier date, very little time remained for filing suit after final denial by the Administrator of Veterans' Affairs." The Joint Resolution and the President's veto memorandum appear in the Appendix herein (*infra*, pp. 27–29).

What is said in the veto memorandum with respect to the claimant's delay in the presentation of a claim being the proximate cause of such a situa-

[5] Passed the Senate, March 13, 1935, 79 Cong. Rec., Part 4, p. 3654. Passed the House, August 20, 1935, 79 Cong. Rec., Part 13, p. 13825.

[6] Presidential approval was withheld from this resolution after the adjournment of Congress, constituting a so-called pocket veto. The veto memorandum giving the reasons for the action taken was signed on September 5, 1935, and filed at the White House.

tion as that of which the petitioner complains, finds support in the *Stallman* decision, *supra*. It is therein recognized (67 F. (2d) 676) that a claimant is charged with the knowledge that he had a limited time to bring suit because of his own delay of many years before taking any steps to assert a claim, and it was therefore "incumbent upon him to acquaint himself with the action of the director on his claim so that he could act promptly" and sue within the time limit. Cf. *United States* v. *Michel*, 282 U. S. 656, 659, *supra*.

II

WHERE THE FILING OF A CLAIM IN THE BUREAU IS DELAYED UNTIL THE LAST DAY ALLOWED BY THE STATUTE, SUIT MUST BE BROUGHT ON THE DAY OF DENIAL

The petitioner also challenges the view taken by the court below that, even if the claim be treated as denied when the notice of disallowance was received through the mails on November 16, 1932, the suit filed a day later was nevertheless not brought within the time limited by the statute.

It appears to be the contention of the petitioner that he gained a full day's suspension of the statute when he filed his claim on July 3, 1931, the last day of the limitation period under the amendment of July 3, 1930, and that he was entitled to have the benefit of an additional day to bring suit after denial.

Such contention seems to be answered by *Creasy* v. *United States*, 4 F. Supp. 175 (W. D. Va.),

supra, where, as in the instant case, a claim was filed on July 3, 1931, the court pointing out (p. 178) that as that day was the last of the year's grace allowed by the amendment there remained no unexpired portion of the limitation to continue after the suspension ended with denial.

Under the provision of the statute the filing of the claim suspended the limitation "for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director." In this case the suspension operated between July 3, 1931, and the date of the denial of the claim, but just as the petitioner would have had to bring suit at the latest on July 3, 1931, except for the filing of his claim in the Bureau, so he was under the necessity of instituting his action on the day that, with the termination of the suspension, stood for July 3, namely, the day of denial.

The fallacy of the petitioner's contention may appear more clearly if it be assumed that a claim was filed on July 2, 1931. Certainly in such circumstances only one day of the year allowed by the amendment remained unexpired, yet the petitioner would contend the same period to be available if the claim were filed the following day. Carried to its logical conclusion, such a contention would allow one day more than a year where a claim was filed on July 3, 1930, and was not denied until after July 3, 1931. This would not only be opposed to the provisions of the statute here involved but also at variance with the general rule that the time

within which an act is to be done is to be computed by excluding the first day and including the last. See *Sheets* v. *Selden's Lessee*, 2 Wall. 177; *Siegelschiffer* v. *Penn Mut. Life Ins. Co.*, 248 Fed. 226 (C. C. A. 2d).

The opinion rendered in this case by the Circuit Court of Appeals refers to a number of cases all computing the suspension period under Section 19 in accordance with the rule above stated (R. 25).

The petitioner cites the case of *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 265, as supporting his contention but we fail to see that the decision is in any way pertinent to the question here involved.

III

AS THE PROCEDURE SET FORTH IN CONSENT LEGISLATION MUST BE STRICTLY FOLLOWED, IT MAY BE QUESTIONED WHETHER PETITIONER TIMELY BROUGHT SUIT IN ANY EVENT

Even if the petitioner should establish that the suspension period of Section 19 continued until notice of denial had been received and that he had an additional day after such notification to institute action, there would still remain the question whether the suit was timely "brought". This question arises from the fact that the procedure for suits against the United States under Section 19 is specifically required to "be the same as that provided in sections 762 and 763 of Title 28, and section 765 of Title 28 so far as applicable."

The last-named section is not here material, but the first two sections (*infra*, pp. 25–26) require *inter*

alia that a plaintiff shall file his petition with the clerk of the court, shall cause a copy thereof to be served on the district attorney of the United States in the district wherein the suit is brought, and shall mail a copy of the petition by registered letter to the Attorney General of the United States. The plaintiff is also required to file with the clerk of the court wherein the suit is instituted an affidavit of such service and the mailing of such letter.

In the instant case the petition was filed on November 17, 1932, but service was not made on the United States Attorney until two days later (R. 2), and while the record does not reveal if, or when, a copy of the petition was mailed to the Attorney General, it is recorded that "summons and return" were filed November 23, 1932 (R. 1), which entry may relate to the required affidavit of service.

The court below treated the suit as instituted on November 17, 1932, when the petition was filed, without discussing the question, but there are authorities which lend support to a contention that the suit was not brought until the requirements of the statute as to service and return had been met. See *Creasy* v. *United States,* 4 F. Supp. 175, 179 (W. D. Va.) *supra; Miller* v. *United States,* 11 F. Supp. 924 (W. D. N. Y.). Cf. *Reid Wrecking Co.* v. *United States,* 202 Fed. 314 (N. D. Ohio); *Cassarello* v. *United States,* 265 Fed. 326 (M. D. Pa.).

In *Walton* v. *United States,* 73 F. (2d) 15, the Circuit Court of Appeals for the Eighth Circuit, while recognizing that when the United States con-

sents to be sued the procedure prescribed by Congress must be strictly followed, nevertheless took the view that the sections in question did not control the institution of suit. It was held that the time of the commencement of the action is to be determined according to the law of the State in which the suit was brought, pursuant to the Conformity Act.

As the law of North Carolina, wherein the instant suit was brought, provides that an action is commenced when summons is issued (Sec. 404, N. Car. Code, 1931), it could possibly be contended under the authority of the *Walton* decision that this suit was instituted with the filing of the petition and the issuance of summons on November 17, 1932.

We believe it may be questioned, however, whether the *Walton* decision accords with the principle frequently recognized by this Court that strict construction is to be given any statute waiving the sovereign immunity of the United States from suit. In *Rock Island &c. R. R. Co.* v. *United States,* 254 U. S. 141, 143, this Court said:

> Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with.

In the light of the above and similar holdings, we are inclined to the view that a suit against the United States pursuant to the provisions of Sections 762 and 763 of Title 28, U. S. C., may not be said to be instituted until all the conditions of the

statute have been met. If such is the correct view, it further establishes that the petitioner's suit herein was not timely brought.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

STANLEY REED,
Solicitor General.
WILL G. BEARDSLEE,
Director Bureau of War Risk Litigation.
WILBUR C. PICKETT,
RANDOLPH C. SHAW,
Special Assistants to the Attorney General.
W. MARVIN SMITH,
Attorney.

DECEMBER 1935.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Section 19 of the World War Veterans' Act, 1924, as amended July 3, 1930, c. 849, Sec. 4, 46 Stat. 992, provides in part as follows (38 U. S. C., Sec. 445):

> In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 5 and 6 of the Act entitled "An Act to provide for the bringing of suits against the Government of the United States," approved March 3, 1887, and section 10 thereof so far as applicable. * * *
>
> No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, and no suit on United States Government life

(converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided*, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further*, That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the bureau shall have three years in which to bring suit after the removal of their disabilities. If suit is seasonably begun and fails for defect in process, or for other reasons not affecting the merits, a new action, if one lies, may be brought within a year though the period of limitations has elapsed. Judgments heretofore rendered against the person or persons claiming under the contract of war-risk insurance on the ground that the claim was barred by the statute of limitations shall not be a bar to the institution of another suit on the same claim. No State or other statute of limitations shall be applicable to suits filed under this section.

* * * * *

The term "claim" as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits and the term "disagreement" means a denial of the claim by the director or someone acting in his name on an appeal to the director. This section, as amended, with the exception of this paragraph, shall apply to all suits now pending

against the United States under the provisions of the War Risk Insurance Act, as amended, or the World War Veterans' Act, 1924, as amended.

Section 13 of the War Risk Insurance Act, as amended October 6, 1917, c. 105, Sec. 2, 40 Stat. 399, provides in part as follows:

> That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, * * *.

The Act of March 3, 1887, c. 359, 24 Stat. 506, provides:

> SEC. 5. That the plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law. (28 U. S. C., Sec. 762.)
>
> SEC. 6. That the plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney-General of the United States, and shall thereupon cause to be filed with

> the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises: *Provided,* That should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court. (28 U. S. C., Sec. 763.)

Veterans' Bureau Regulation No. 3107, so far as herein relevant, reads as follows:

> If a decision is rendered by the insurance claims council adverse to the allegation made by the claimant, a letter so advising the claimant will be concurrently prepared and sent to the claimant at his last address of record. Said letter will advise the claimant the date on which the council denied the claim, and that the claimant may consider such denial final for purposes of instituting suit under section 19 of the World War veterans' act, 1924, as amended. Said letter should further advise the claimant that if he accepts the denial of the claim by the council as final, *the suspension of the statute of limi-*

tations provided by section 19 shall cease from and after the date of this letter plus the number of days usually required by the post-office department for the transmission of regular mail from Washington, D. C., to the claimant's last address of record, and that his case folder has been forwarded to the appropriate office or station (giving name and address of office or station) and that any future inquiries should be directed to that office or station. * * * (November 1, 1931.) (Italics ours.)

Joint Resolution (S. J. Res. 65, 74th Cong., 1st Sess.), adopted August 20, 1935, is as follows:

[S. J. Res. 65, 74th Congress, 1st Session]

In the House of Representatives. March 15, 1935. Referred to the Committee on World War Veterans' Legislation.

JOINT RESOLUTION To extend the period of suspension of the limitation governing the filing of suit under section 19, World War Veterans' Act, 1924, as amended.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in addition to the suspension of the limitation for the period elapsing between the filing in the Veterans' Administration of the claim under a contract of insurance and the denial thereof by the Administrator of Veterans' Affairs or someone acting in his name, the claimant shall have ninety days from the date of such denial within which to file suit as herein provided. This resolution is made effective as of July 3, 1930, and shall apply to all suits now pending against the United States under the provisions of section 19, World War Veterans' Act, 1924, as amended, and

any suit which has been dismissed solely on the ground that the period for filing suit has elapsed but wherein the extension of the period for filing suit as prescribed herein would have permitted such suit to have been heard and determined, may be reinstated within ninety days from the date of enactment of this resolution: *Provided,* That on and after the date of enactment of this resolution, notice of denial of the claim under a contract of insurance by the Administrator of Veterans' Affairs or someone acting in his name shall be by registered mail directed to the claimant's last address of record.

The President's veto memorandum, dated September 5, 1935, is as follows:

I have disapproved "S. J. Res. 65, Joint Resolution to extend the period of suspension of the limitation governing the filing of suit under Section 19, World War Veterans' Act, 1924, as amended" for these reasons:

Apparently the main purpose of this Resolution is to afford further opportunity for persons to sue on their War Risk Insurance where such action was not taken because of the passage of Public No. 2, or, because of failure to file claim at an earlier date, very little time remained for filing suit after final denial by the Administrator of Veterans' Affairs. Any meritorious claim can be filed and allowed by the Veterans' Administration without recourse to the courts.

The Government's policy in permitting suits upon War Risk Insurance has been one of great liberality. It appears to me, in the absence of clear and satisfactory evidence explaining or justifying the long delay before bringing suit, that the very delay would be an indication of the weakness of the

claim. These situations only arise because of the failure of the claimant to file his claim more promptly and is in no sense the fault of the Government.

The Government's liability over and above all premiums received on War Risk Insurance now exceeds a billion and three-quarters. This legislation potentially would add greatly to the final cost. I do not feel that a valid reason exists for this additional expenditure.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
September 5, 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 192

HERBERT LESTER TYSON
Petitioner
vs.
THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF AMICUS CURIAE

WARREN E. MILLER,
SOUTHERN BUILDING,
WASHINGTON, D. C.,
Amicus Curiae.

Washington Daily Record, Printcraft Building

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 192

HERBERT LESTER TYSON
Petitioner
vs.
THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF AMICUS CURIAE

MAY IT PLEASE THE COURT:

Permission is respectfully requested of this Court to file a brief herein as *amicus curiae* presenting for

the consideration of the Court certain phases of the question here involved which is of great importance to many disabled World War veterans and their beneficiaries.

J. Melville Broughton, Attorney for Petitioner and Honorable Stanley Reed, Solicitor General of the United States, on behalf of respondent, have kindly consented to the filing of this *amicus curiae* brief.

Wherefore, leave of Court is respectfully requested to file as *amicus curiae* the brief hereto annexed.

(signed) WARREN E. MILLER.

DISTRICT OF COLUMBIA:

Warren E. Miller being duly sworn deposes and says that the facts and matters stated in the foregoing motion are true and correct:

(signed) WARREN E. MILLER.

Subscribed and sworn to before me this 19th day of December, 1935.

RANDOLPH C. RICHARDSON, *Notary Public D. C.*

BRIEF AMICUS CURIAE

STATEMENT

On July 2, 1931 petitioner signed and executed U. S. Veterans' Administration Form 579, a claim for (R.6) total permanent disability benefits under his insurance contract. This was received by said Administration at Washington, D. C. on July 3, 1931.

The claim was acted upon by the Insurance Claims Council and a letter bearing date of November 12, 1932 (R. 15-16), and mailed from Washington (R. 7) November 14, 1932 was received by petitioner at his R. F.

D. address in Bladen County, North Carolina on November 16, 1932. This letter (R. 15) advised petitioner that the evidence was not sufficient to establish total permanent disability and that petitioner could consider such denial final for the purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended, and further stated:

> "If you accept the denial of the claim by the Council as final the suspension of the Statute of Limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C. to your last address of record."

Petition was filed and summons issued on November 17, 1932 (R7).

PERTINENT STATUTE AND REGULATIONS

Section 19, World War Veterans' Act, 1924, as amended July 3, 1930 (38 U. S. C. 445), which is the only law under which the United States has consented to be sued in contracts of this nature, provides in part:

> "*In the event of a disagreement as to a claim,* including claim for refund of premiums, *under a contract of insurance between the Bureau and any person or persons claiming thereunder* and action on the claim may be brought against the United States. . . ." (Italics supplied.)
>
> • • • •
>
> "No suit on yearly renewable term insurance shall be allowed under this section unless the same

shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date, and no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: Provided, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded; Provided further, *That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. . . . .*" (Italics Supplied.)

Section 5, World War Veterans' Act, 1924 as amended July 3, 1930 provides:

"*The director,* subject to the general direction of the President, shall administer, execute and enforce the provisions of this act, and for that purpose *shall have full power and authority to make rules and regulations, not inconsistent* with the provisions of this Act, which are *necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act; and all decisions of questions of fact and law affecting any claimant to the benefits of Titles II, III, or IV of this Act shall be conclusive except as otherwise provided herein.* All officers and employees of the bureau shall perform such duties as may be assigned them by the director. All official acts performed by such officers or employees specially designated therefor by the director shall have the same force and effect as though performed by the director in person. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations,

unless the context otherwise requires, shall or may be made by the director. The director shall adopt reasonable and proper rules to govern the proceedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of compensation, insurance, vocational training, or maintenance and support allowance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards:" (Italics supplied.)

Section 3107 of the United States Veterans' Administration regulations in force when action was taken upon this claim, provides:

"If a decision is rendered by the insurance claims council adverse to the allegation made by the claimant, a letter so advising the claimant will be concurrently prepared and sent to the claimant at his last address of record. Said letter will advise the claimant the date on which the council denied the claim, and that the claimant may consider such denial final for purposes of instituting suit under section 19 of the World War Veterans' Act, 1924, as amended. *Said letter should further advise the claimant that if he accepts the denial of the claim by the council as final, the suspension of the statute of limitations provided by section 19 shall cease from and after the date of this letter plus the number of days usually required by the post office department for the transmission of regular mail from Washington, D. C., to the claimant's last address of record;* and that his case folder has been forwarded to the appropriate office or station (giving name and address of office

or station) and that any future inquiries should be directed to that office or station. If an appeal is filed the case file together with the appeal will be forwarded by the regional office or combined facility to the administrator, through the director of insurance, who shall at the time of forwarding the same indicate his approval or disapproval of the decision of the insurance claims council, from which appeal is taken. (November 1, 1931) (Italics supplied.)

QUESTIONS PRESENTED

The question presented is whether the instant suit was begun within the time prescribed by Section 19 of the World War Veterans' Act, 1924, as amended, which in turn presents the following questions—

(a) When does the jurisdictional "disagreement" authorizing suit as contemplated by said Section 19 arise?

(b) When was this suit instituted?

(c) When does the Statute of Limitations begin?

ARGUMENT

(a) WHEN DOES THE JURISDICTIONAL "DISAGREEMENT" AUTHORIZING SUIT AS CONTEMPLATED BY SAID SECTION 19 ARISE?

The position taken by the United States in the instant case is a direct attack upon the authority of the Administrator of Veterans' Affairs to establish by regulation the effective date of his denial of a claim for insurance benefits and the ending date of the suspension of the statute of limitations, which regulation has been acted upon by many thousands of disabled World War veterans and their beneficiaries who be-

lieved that they were justified in relying upon the information given them by the Administrator of Veterans' Affairs pursuant to the provisions of Section 3107, United States Veterans' Administration regulations promulgated by him.

The authority of the Administrator of Veterans' Affairs to promulgate this regulation is found in the first section of Public 522, 71st Congress, approved July 3, 1930 (46 Stat. 991) which provides:

> "Sec. 5 The director, subject to the general direction of the President, shall administer, execute, and enforce the proivsions of this Act, *and for that purpose shall have full power and authority to make rules and regulations,* not inconsistent with the provisions of this Act, *which are necessary or appropriate to carry out its purposes, and shall decide all questions* arising under this Act; and all *decisions of questions of fact and law* affecting any claimant to the benefits of Titles II, III, or IV *shall be conclusive* except as otherwise provided herein. . . ." (Italics supplied.)

In order that this court might be apprised of certain facts with respect to the procedure and practise of the United States Veterans' Administration relative to denial of claims for total and permanent disability and the issuance of the letter indicating disagreement as contemplated in Section 19, World War Veterans' Act, 1924, as amended, there is set forth in the appendix, pages 24 to 34, a letter signed by Frank T. Hines, Administrator of Veterans' Affairs, addressed to Watson B. Miller, Chairman, National Rehabilitation Committee, The American Legion, which is self-explanatory.

While the procedure of the Veterans' Administration relative to the issuance of the letters of disagree-

ment originally contemplated that such letters would be simultaneously issued at the time the decision was rendered, yet from an administrative standpoint it was not possible to do this and hence such letters were not issued until some days (an average of five) subsequent to the rendition of the decisions.* It was in part in recognition of the delay which might ensue between the time a decision denying a claim for insurance was rendered and the mailing of the notice of disagreement which induced the promulgation of the procedure set forth in the above quoted regulation with reference to the ceasing of the suspension of the statute of limitations.* This procedure was followed until August 23, 1935.**

The purpose of the denial is to create a "*disagreement*," as contemplated by Section 19, World War Veterans' Act, 1924, as amended, in order for suit to be instituted. It appears obvious that for such a disagreement to be accepted and the letter advising of the final denial to serve its purpose, viz., confer authority to institute suit, one must have knowledge of the action taken. It is fundamental that one cannot be deprived of their rights without notice.

The regulations provided for notice of denial. The veteran was informed of the fact that the statute of limitations began to run when he received the letter, and he had a right to rely upon the valid regulation which has the force and effect of law, as well as the letter which he received informing him of his rights.

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*See paragraph 4, letter of December 5, 1935 from Frank T. Hines, Administrator of Veterans' Affairs set forth in Appendix, page 26.

**See paragraph 5 of the above letter in Appendix, page 26.

To hold otherwise would mean that the veteran was deceived and misled to his detriment. As was said by this court in the case of *Wilbur National Bank vs. United States* in decision rendered February 4, 1935, 79 L. Ed. 402 at page 405:

> "The statutes and regulations which govern the War Risk Insurance Bureau we must assume are known to those who deal with it."

As was said by this Court in the case of *Lynch vs. United States*, 292 U. S. 571, (78 L. Ed. 1434 at page 1439)—

> "In order to promote efficiency in administration and justice in the distribution of War Risk Insurance benefits, the Administration was given power to prescribe the form of policies and to make regulations. The form prescribed provided that the policy should be subject to all amendments to the original Act, to all regulations then in force or thereafter adopted."

The regulations issued by the Director are a part of the contract of insurance under the expressed terms thereof (*White vs. U. S.*, 270 U. S. 175, 70 L. Ed. 530) and these regulations which are a part of the contract, are as binding on the government as they are upon the veteran. *Lynch vs. U. S.*, 292 U. S. 571 (78 L. Ed. 1434).

Applying this rule of law to the instant case, it follows that this veteran had a right to rely, as he did rely, upon the regulation in force when he received this disagreement to wit, Section 3107.

The statutes and regulations gave this veteran the right to file suit within the time allowed by the regula-

tions. The decision of the Insurance Claims Council is conclusive upon the question of total and permanent disability but is not of itself a denial of the claim. It is not "self-executing." By its provisions it requires a letter, based upon this decision, written under the authority of the director, to be effective. Under the law, the denial is by the director. The decision of the Insurance Claims Council is effective only when the director promulgates it. Under the regulations, the Council's decision is conclusive only upon the question of total and permanent disability. It is conclusive until it is set aside. The Administrator might hold up a decision for further investigation or for some other reason and the denial is not effective until a letter is written in accordance with the regulations giving notice thereof, and received by the veteran.

Section 500, World War Veterans' Act, as amended, March 4, 1925 provides:

> "Sec. 500. Except in the event of legal proceedings under Section 19, of Title 1 of this act no claim agent or attorney . . . shall be recognized in the presentation or adjudication of claims. . . ."

It will thus be seen that an attorney had no standing before the Veterans' Administration in presenting a claim. Suit could only be instituted "in the event of a disagreement as to claim . . . *between* the Bureau and any person or persons claiming thereunder an action on the claim may be brought. . . ." Before the government can be sued there must be a dis agreement *between* the veteran and the Bureau. How could this "disagreement" be *between* the Bureau and the veteran when only one of these two par-

ties know about it? The claim of the veteran on one hand must be made to the Bureau and the denial or refusal of the Bureau to grant said claim must be made to the veteran before the transaction is completed *between* the two of them. Between two persons as between two points means "from one to the other."

The government could in effect, by failing to notify the veteran of the denial destroy his right to sue if it did not communicate its denial to the veteran. Like wise by withholding notice of decision the Veterans' Administration can defeat all claims, if respondant's contention be upheld.

It is respectfully submitted that the power to *make* a decision as granted by law to the director carries with it the power to say the time when the decision is effective.

In the case of *Baraby vs. United States,* 1 Fed. Supp. 443 at page 444 the court stated:

> "It seems quite clear that claimant could have commenced his action within a reasonable time after notice of the rejection of his claim by the director. In other words there should be read into the statute a requirement for service of notice upon claimant of final action on his claim and a reasonable time after receipt of notice, within which to file his complaint in event of a disagreement. . . The spirit and reason of the law should prevail over its letter; words may accordingly be rejected and others substituted. The Court should give effect to the intent of Congress. The policy of the legislation as a whole should be considered, the reason of its enactment, its antecedent history; this should be given effect according to 'its design and purpose sacrificing if necessary, literal meaning in order that the purpose may not fail'."

Ozawa vs. U. S., 260 U. S. 178,—67 L. Ed. 100-36 Cyc 1108C."

In the case of Boan vs. United States, 3 Fed. Supp. 219 at page 221, the court stated:

> "If a decision is rendered by the insurance claims council adverse to the allegations made by the claimant, a letter so advising the claimant will be concurrently prepared and sent to the claimant at his last address of record. Said letter will advise the claimant the date on which the council denied the claim, and that the claimant may consider such denial final for purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended. Said letter should further advise the claimant that if he accepts the denial of the claim by the council as final, the suspension of the statute of limitations provided by section 19 shall cease from and after the date of this letter plus the number of days usually required by the post office department for the transmission of regular mail from Washington, D. C., to the claimant's last address of record, and that his case folder has been forwarded to the appropriate office or station (giving name and address of office or station) and that any future inquiries should be directed to that office or station. If an appeal is filed the case file, together with the appeal, will be forwarded by the regional office to the Administrator, through the director of insurance, who shall at the time of forwarding the same indicate his approval or disapproval of the decision of the insurance claims council from which appeal is taken."

It is fundamental that great weight is to be given to the construction given to a statute by the department charged with its administration unless the construc-

tion is clearly wrong or unless a different construction is plainly required.

U. S. vs. Jackson, 280 U. S. 183; 74 L. Ed. 361, and cases cited therein.

Pursuant to authority granted in Section 5 of the World War Veterans' Act, 1924, as amended, *supra,* Section 3107 of the Veterans' Administration regulations was promulgated, authorizing the veteran to be advised that if he considered such letter a final denial for the purpose of instituting suit, *the suspension of the statute of limitations as provided by section* 19, *World War Veterans' Act,* 1924, *as amended would cease from and after the date of the letter, plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C., to the claimant's last address of record.* (Section 3107 United States Veterans' Administration regulations effective November 1, 1931).

The authorities appear to hold that a claim is not filed when it is deposited in the mail, but only when *received* in the Bureau. Under these circumstances, why should the denial of the Bureau be held to be effective before it is *received* by the claimant? Not only do the Bureau's regulations require the notice ot be sent to the claimant (Section 3107, supra) but common fairness demands it. To hold a disabled World War veteran living in North Carolina to knowledge of the exact date when the Veterans' Administration in Washington acts upon his claim is a situation which was certainly not contemplated by Congress.

The decision of the Fourth Circuit Court of Appeals in the instant case is contrary to its own decision in the case of *Weaver vs. United States* (C. C. A. 4th) 72

Fed. (2d) 20, where at page 22 that court, contrary to its holding in the instant case stated:

> "Even if it could fairly be found from the facts stated that the plaintiff's claim was received by the Bureau on July 3, 1931, it could not be said that the statute was suspended for more than one day; and therefore after the denial of liability by the Bureau and receipt of notice thereof by the plaintiff he had only one day thereafter at the most to institute suit."

The decision of the lower court in the instant case is directly in conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *United States vs. Walker*, 77 Fed. (2d) 415, where the court held at page 416—

> "It s to be noted that under the statute the period of extension begins with 'the filing in the bureau of the claim sued upon,' and ends, not with the filing of the order denying the claim, but with 'the denial of said claim by the director.' It well may be supposed that in enacting the statute the lawmakers had in mind the methods pursued in the bureau in dealing with such claims, that claims are transmitted by claimants from all parts of the country, and that a claimant first learns of the bureau's action on his claim when he is informed of that action by the bureau, and that communications between claimants and the bureau generally are by mail Nothing in the language of the statute indicates a purpose to make a denial of the claim effective prior to delivery of notice of it at the place of the claimant's address. A regulation covering the matter of giving notice of disagreement to the claimant was in force at the time appellee's claim was acted on. That regula-

tion provides for the claimant being informed by letter of a denial of his claim, and that 'the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C. to the claimant's last address of record.' The adoption of that regulation was the exercise of a power conferred by section 19 of the World War Veterans' Act, as amended (38 U. S. C. A. Par. 445). Boan vs. United States (D. C.) 3 F. Supp. 219. It could not reasonably have been contemplated that the period of extension of limitation would end, with the result of enabling the claimant to bring suit on his claim, prior to the receipt at claimant's last address of record of notice of the denial of his claim. Certainly it was not contemplated that it would be permissable for a claimant to institute suit on his claim proir to his receipt of information of the denial of that clai mby the director. The language used in the statute is entirely consistent with the existence of an intention that the denial of the claim become effective at the time of the receipt at the claimant's address of notice of that action. We concur in decisions to the effect that the suspension of limitation ends at that time, not before the claimant could have been aware that he had the right to bring suit on his claim. Weaver vs. United States (C. C. A.) 72 F. (2d) 20; Creasy vs. United States (D. C.) 4 F. Supp. 175."

In the case of *United States vs. Tarrer* 77 Fed. (2d) 423 which was a case where claim was filed June 27, 1931, the court said, at page 425:

"and so the insured would have been entitled to six days after the denial of his claim within which

to sue. The claim must be held to have been denied on November 20, 1931, when it reached its destination, United States vs. Walker, 77 F. (2d) 415, decided April 13, 1935, although it was not received until a later date. Stallman vs. United States (C. C. A.) 67 F. (2d) 675."

In the case of *Creasy vs. United States*, 4 Fed. Supp. 175 the claim was mailed at Roanoke Virginia, July 1, 1931 and received at the Veterans' Bureau at Washington July 3, 1931. The communication denying the claim was a letter from the Veterans' Bureau dated May 6, 1932, mailed in Washington on May 9, 1932, and received by the veteran at Roanoke, Virginia on May 10, 1932, about noon. On May 11, 1932 petition was filed with the clerk of court and on May 13, a copy was served on the United States Attorney. The court in its opinion at page 177 stated:

"It seems logical that the claim is to be taken as denied as of the date when the claimant is informed of the denial. The limitation on bringing suit is suspended while the claim is under consideration by the Bureau, but begins to run again as soon as the claim is denied; and the duty then rests upon the claimant to bring his suit within such time as remains of the period of limitation. If the act of denial of the claim imposes upon the veteran the condition that he must sue within a limited time thereafter, surely he cannot be expected to comply with this condition until such time as he has knowledge of the denial of his claim. In fact, he cannot sue until he knows that his claim has been denied and is no longer under consideration at the Bureau. Only after he has received notice of the denial can he allege the disagreement which is essential to the maintenance of a suit. I hold, therefore, that the claim is to be

taken as denied on the date when the claimant received the letter informing him of the denial. It may be argued that it is unreasonable to suppose that a letter dated May 6th in Washington did not reach Roanoke, Va., until May 10th. But the time when the letter was received is a matter to be shown by evidence, and in this case the only evidence introduced is that the letter of denial was received on May 10th, inclosed in an envelope postmarked at Washington on May 9th. With the enormous correspondence handled in the Veterans' Bureau, it is not improbable that the letter was not mailed for a day or so after May 6th. On the evidence, I must hold that the plaintiff received notice of the denial of his claim on May 10th, as stated by him."

In *Albek vs. United States,* 4 Fed. Supp. 1020, the District Court of the Eastern District of New York in discussing this question says (Page 1021):

"The date of receipt of that letter is not stated in the bill of particulars and under the decision of Creasy vs. United States (D. C.) 4 F. Supp. 175, for reasons therein convincingly stated, the duty of beginning suit would not arise until the receipt of that letter."

The case of *Wozniak, Administratrix vs. United States* No. 705 decided August 27, 1935, (— Fed. Supp. —) in the United States District Court, Western District, New York, it is respectfully submitted, correctly states the law. This decision was as follows:

"The defendant moves for a dismissal of the complaint for want of jurisdiction. Its contention is based upon the claim that the action was not commenced within the statutory period. Proof

has been taken before the court relative to the date of the commencement of the action herein.

While there are certain facts disclosed by the testimony which seem to cause some confusion as to the time when the action was commenced, I am disposed to accept the testimony given by Mr. Naples associated with counsel for plaintiff. Accepting such testimony, I am convinced that the action was commenced within the time fixed by law.

What constitutes "the filing in the Bureau of the claim in suit and the denial of the said claim by the director" (U. S. C. A., T. 38-445) has frequently had judicial construction. As I view it, the claim is filed when actually received and filed in the Bureau. The denial is effective when received by the claimant.

These views are supported by the weight of judicial authority, in accord with a reasonable interpretation of the statute, and fair as respects the rights of claimant and the Government.

The following cases all touch one or the other of the above points:

Weaver vs. United States, 72 Fed. (2d) 20, (C. C. A.).

Creasy vs. United States, 4 Fed. Supp. 175.

U. S. vs. Walker, 77 Fed. (2d) 415, (C. C. A.).

U. S. vs. Tarrer, 77 Fed. (2d) 423, (C. C. A.).

Tyson vs. U. S., 76 Fed. (2d) 533, is in conflict with the views herein expressed and these authorities. As indicated, the court does not intend to follow the views therein expressed."

It is respectfully submitted that when the Director, in a quasi-judicial proceeding, renders a decision in Washington, D. C. providing, as a part of his adjudication, that it shall not become effective until the veteran receives notice thereof, and such action is pursuant to

statutory authority, and the veteran relies upon the same and acts accordingly, certainly the government should be estopped from repudiating the Director's action.

This question was recently passed upon by Commissioner William R. Harris of the Supreme Court of the District of Columbia in the case of *Bowers vs. United States,* Law No. 82 384, who held that the denial of a claim for insurance benefits by the Insurance Claims Council did not become effective, under the regulations of the Veterans' Administration, until notice of such denial was received by the claimant. Commissioner Harr's report to the Court on this point contains a careful review of the pertinent statutes and regulations as well as of the judicial decisions covering the point. There is set forth verbatim in the appendix hereof (pages 36 to 63) a copy of his said report, together with a copy of his supplemental report, (appendix pages 64 to 68) distinguishing the case of *United States vs. Michel,* 284 U. S. 656, upon which the Government so strongly relies in the case at bar. This opinion, it is urged, correctly states the law applicable to the instant case.

In view of the foregoing it must be concluded as a matter of law that the jurisdictional "disagreement" does not become operative until the petitioner was notified of the denial of his claim in accordance with the Veterans' Administration *procedural* regulations, which were valid.

(b) WHEN WAS THIS SUIT INSTITUTED?

It was held in a war risk insurance suit by the United States Circuit Court of Appeals for the Eighth

Circuit in the case of *Walton vs. United States* (73 Fed. (2d) 15) that—

> ". . . the time of the commencement of an action at law is determined by the law of the state, in the absence of any controlling Act of Congress. (28 USCA par. 724, 725); Ex parte Connaway, Receiver of Moscow National Bank, 178 U. S. 421, 20 S. Ct. 951, 44 L. Ed. 1134; Fearing vs. Glenn (C. C. A.) 73 F. 116; International Bank & Trust Co. vs. Scott (C. C. A.) 159 F. 58."

Section 475 of the Consolidated Statutes of North Carolina provides that Civil actions shall be commenced by issuing a summons.

A Civil action is commenced when the summons is issued and the suit is pending from that date. The summons is issued when it passes from the Clerk for the purpose of being served.

Atkinson vs. Greene, 197 N. C., 118-120, 147 S. E., 811.
Morrison vs. Lewis, 197 N. C., 79, 147 S. E., 729.

It follows, therefore, that this suit was instituted on November 17, 1932 when the summons was issued.

(c) WHEN DOES THE STATUTE OF LIMITATIONS BEGIN?

Under the express provisions of Section 19, World War Veterans Act, 1924 *Supra*, the statute of limitations commences to run within six years, "*after* the right accrued for which claim is made, or within one year *after* the date of approval of this Amendatory Act." It "is suspended for the period elapsing *be-*

tween the filing in the bureau of the claim sued upon and the denial of such claim by the director." (Italics supplied.)

In *U. S. vs. Hardy* et al. 74 Fed. (2d) 841 the rule respecting the computation of time was correctly stated as:

"It is a general rule that, where the period for doing an act is to be reckoned from the happening of any other event, the day on which the event happened may be regarded as a point of time and so may be excluded from the calculation," (citing *Burnet, Commissioner vs. Willingham* L. & T. Co., 282 U. S. 437, 51 S. Ct. 185, 75 L. Ed. 448).

In Westling vs. U. S. (C. C. A. 9) 64 Fed. (2d) 464, that court at page 464 made the following comment relative to the statute relied upon by the Government in the instant case:

"Thus, in the second paragraph of section 4, the period of limitations was extended for another year 'in order that,' to quote the Senate Committee report, 'no veteran may be deprived of his right to enforce his contract of Government insurance merely because of lapse of time.'* The same paragraph re-enacted the provisions of the act of May 29, 1928, chapter 875, par. 1, 45 Stat. 964, by which the period of limitations was suspended during the pendancy of a claim in the bureau and an additional year was given to renew an action which fails for 'defect in process, or for other

*Sen. Rep. 885, 71st Cong., 2d Sess., 1930 reporting H. R. 10381. This bill was vetoed. H. Doc. 495, 71st Cong., 2d Sess., 1930. But, as finally enacted, the Act of July 3, 1930, did not alter in any respect here material the provisions to which the above-quoted remarks were addressed.

reasons not affecting the merits.' Furthermore, the statute, like the act of 1928, permits a new action notwithstanding that a judgment had theretofore been rendered against the insured, if that judgment was based upon the defense of time limitation. The liberal policy embodied in these provisions indicates the spirit in which the interpretation of this legislation, at least insofar as it affects claimants' right to judicial review, should be approached."

The law with respect to war risk insurance contracts is entitled to the most liberal construction in favor of the disabled veteran.

U. S. vs. Cox (C. C. A. 5) 24 Fed. (2d) 944, McNally, et al vs. U. S. (C. C. A. 8) 52 Fed. (2d) 440, U. S. vs. Phillips (C. C. A. 8) 44 Fed. (2d) 689, Glazow vs. U. S. (C. C. A. 2) 50 Fed. (2d) 178, U. S. vs. LePage (C. C. A. 1) 59 Fed. (2d) 165, U. S. vs. Arzner, 287 U. S. 470, White vs. U. S. 270 U. S. 175.

Therefore, it is respectfully submitted that under the statute here applicable, considered in the light of the rule of law excluding the day on which the event happened, and the liberal policy embodied in this legislation, beneficial in nature to a group of our citizens, that the statute of limitations began to run *after* November 17, 1932, and on November 17, 1932, the [redacted] suit was filed.

timely

CONCLUSION

It is therefore respectfully submitted that the instant case was begun within the time prescribed by Section 19, of the World War Veterans' Act, 1924, as amended as (a) the jurisdictional "disagreement" authorizing suit as contemplated in said section did not

exist until the time established by the director in the Veterans Administration regulations, (b) suit was instituted when summons was issued on November 17, 1932, and (c) the statute of liimtations did not begin to run until *after* [redacted] November 17, 1932; and therefore the instant suit was timely filed and the decision of the Circuit Court should be reversed.

Respectfully submitted,

WARREN E. MILLER,
SOUTHERN BUILDING,
WASHINGTON, D. C.,
Amicus Curiae.

APPENDIX

VETERANS ADMINISTRATION
Washington, D. C., December 5, 1935
Office of the Administrator of Veterans Affairs

Captain Watson B. Miller, Chairman,
National Rehabilitation Committee,
The American Legion,
1608 K Street, N. W.,
Washington, D. C.

My dear Captain Miller:

I have your letter dated November 16, 1935, stating that in presenting an amicus curiae brief to the United States Supreme Court in the case of Tyson vs. the United States, No. 192, October Term, 1935, it is deemed desirable to show certain facts with respect to the procedure and practice of the United States Veterans' Administration relative to denial of claims for total and permanent disability, and the issuance of the letter indicating disagreement, as contemplated in Section 19, World War Veterans' Act, 1924, as amended.

It is understood that the Tyson case is a suit filed by Herbert Lester Tyson (C-776, 289) against the United States on his contract of yearly renewable term insurance, and is pending in the Supreme Court on a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, the question for decision being the effective date of the denial of a claim for insurance within the meaning of Section 19 of the World War Veterans' Act, as amended July 3, 1930, and the termination of the suspension of the statute of limitations provided for by said section, or, better perhaps, my authority as Administrator of Veterans' Affairs to establish by regulation the ending date of such suspen-

sion and the effective date of the denial, by providing that the denial of the claim did not become effective, and that the suspension of the statute of limitations did not terminate until notice thereof was received, or should have been received, by the claimant in the usual course of transmission of regular mail.

After stating that you have observed that for a considerable period of time after the decision of the United States Supreme Court in the cases of Lynch and Wilner versus the United States, 292 U. S., 570, 78 L. Ed. 1434, the Insurance Claims Council of the Veterans' Administration acted upon and rendered decisions denying insurance claims, but over a period of several months the veterans whose claims were acted upon during this period were not advised of such action, you request the following information and instruments:

1. The approximate number of cases in which the letter of disagreement was not issued simultaneously with the action of the Council in rendering its decision.

2. What period of time the above procedure was followed.

3. Duly certified copies of orders or instructions which were promulgated discontinuing the issuance of disagreements at or about the time the Economy Act was passed.

4. Certified copies of instructions authorizing the issuing of disagreements after June 4, 1934, when the Lynch and Wilner cases were decided by the United States Supreme Court.

5. Any changed instructions relating to these matters at any later dates, with dates of all such instructions, and the reasons the pro-

cedure did not contemplate advising the veterans of the disagreement at the time the decision denying his claim was rendered.

Answering question No. 1, you are advised that the procedure of the Veterans' Administration with reference to the issuance of so-called letters of disagreement contemplated that such letters would be issued simultaneously with the rendition of the decisions. It was not always possible to do this, and in a number of cases—which would be difficult to approximate—such letters were not issued until some days—say an average of five, of course, possibly more—subsequent to the rendition of the decisions. It was in part in recognition of the delay which might ensue between the time a decision denying a claim for insurance was rendered, and the mailing of the notice of disagreement, which induced the promulgation of the procedure with reference to the ceasing of the suspension of the statute of limitations.

Answering question No. 2, you are advised that the foregoing procedure was followed until August 23, 1935, as of which date procedure was established which would insure that such letter of disagreement would be dispatched by registered mail on the date the decision was rendered.

In compliance with your request for certified copies of orders or instructions which were promulgated discontinuing the issuance of disagreements at or about the time the Economy Act was passed, there is enclosed a certified copy of the pertinent part of a radiogram to all regional offices and combined facilities of the Veterans' Administration directing discontinuance of consideration of claims under contracts of yearly

renewable term insurance, together with a copy of a radiogram with further reference to this subject.

With reference to your request for certified copies of instructions authorizing the issuing of disagreements after June 4, 1934, there is enclosed a certified copy of a memorandum dated July 6, 1934, authorizing the resumption of consideration of claims under contracts of yearly renewable term insurance.

Complying with your request for any changed instructions relating to the subject under discussion, there are enclosed certified copies of instruction memorandum, dated November 2, 1934, discontinuing the issuance of so-called letters of disagreement; memorandum dated February 1, 1935, relating to the issuance of letters of disagreement, and memorandum dated August 23, 1935, with reference thereto.

With reference to your observation that for a considerable period of time subsequent to the decision of the Supreme Court in the Lynch and Wilner cases the Insurance Claims Council rendered decisions denying claims, but over a period of several months did not advise the veterans whose claims were acted on of the action taken, you are advised that commencing July 6, 1934, the Insurance Claims Council resumed rendering decisions under contracts of yearly renewable term insurance, and letters advising claimants of the denial of such claims were released in accordance with the procedure referred to in answering your question No. 1, and the Insurance Claims Council continued to render decisions and advise claimants of the action taken until November 2, 1934. Regional offices, however, did not resume rendering decisions.

From November 2, 1934, and until February 1, 1935, because of the attack made in the case of John H. Fred-

erick versus The United States on my authority as Administrator of Veterans' Affairs to delegate to the Insurance Claims Council authority to render final decisions on claims for insurance within the meaning of Section 19 of the World War Veterans' Act, as amended July 3, 1930, decisions rendered by the Insurance Claims Council were only tentative.

Commencing February 1, 1935, following the approval of Public Resolution No. 1, 74th Congress, to clarify the definition of disagreement in Section 19, World War Veterans' Act, 1924, as amended, the Insurance Claims Council made the above mentioned decisions final, as they could be reached in the due course of business, and after such decisions were made final, notices thereof were sent to the claimants by registered mail. The dates of those notices, however, were not, in every case, the same dates as of which the decisions became final. However, by the procedure adopted on August 23, 1935, reference to which is made in answering question No. 2, notices of disagreement of claims for insurance, filed on or prior to July 3, 1931, and/or within six years after the right accrued for which the claim was made, are mailed by registered mail on the dates the decisions are rendered.

For possible clarification on the subject, you are advised, as follows:

At the approval of the Economy Act, and for some time prior thereto, claims for benefits under policies of Government life insurance, and contracts of yearly renewable term insurance, were considered by the Veterans' Administration under the provisions of Veterans' Administration Regulations, paragraphs 3200, 3201, 3202, 3203, 3204, and 3205, and Veterans' Administration Procedure, paragraphs 3100, 3101, 3102, 3103,

3104, 3105, 3106, 3107, 3108, 3109, 3110, 3111, 3112, and 3113.

The foregoing regulations created the Insurance Claims Council, and delegated to it jurisdiction in determining total and permanent disability for the purpose of automatic insurance, United States Government life insurance, and yearly renewable term insurance, for the purposes of Section 19 of the World War Veterans' Act, as amended. Managers of regional offices and combined facilities were vested with concurrent jurisdiction to finally deny claims for benefits of yearly renewable term insurance because of alleged permanent and total disability, where the records showed that there was present no disability of a high degree.

The foregoing procedure, among other things (paragraphs 3107 and 3111), provided that where a decision was adverse to the allegation made by the claimant, a letter so advising him would be concurrently prepared and sent to him at his last address of record, which letter should advise the claimant of the date of which his claim was denied; that he might consider it a final denial for the purpose of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended, and that the suspension of the statute of limitations as provided by Section 19, supra, would cease from and after the date of the letter, plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C., or the regional office or combined facility, as the case might be, to the claimant's last address of record.

During the foregoing period, the Legal Service of the Veterans' Administration assisted the Department

of Justice in the preparation for trial of suits for insurance, and assisted in the trials of many of such suits, and during this period it was conceded at the trial of such suits that the suspension of the statute of limitations did not expire at the rendition of a decision denying the claim for insurance, but that there should be included in the suspension period the number of days usually required by the Post Office Department to transmit the letter advising of the denial.

Effective September 4, 1934, which was shortly subsequent to the rendition of the opinion of the Supreme Court in the Lynch and Wilner cases, the above mentioned regulations and procedure were revised. The revised regulations rescinded and delegation of authority to regional offices and combined facilities to act upon claims for insurance of any kind, and conferred exclusive jurisdiction to do so on the Insurance Claims Council.

The revised procedure, among other things, amended paragraph 3107 by omitting therefrom the words "for purposes of instituting suit under section 19 of the World War Veterans' act, 1924, as amended," and the words "Said letter should further advise the claimant that if he accepts the denial of the claim by the council as final, the suspension of the statute of limitations provided by section 19 shall cease from and after the date of this letter plus the number of days usually required by the post office department for the transmission of regular mail from Washington, D. C., to the claimants last address of record."

Paragraph 3111 was cancelled, for the reason that it applied to regional offices and facilities, whose authority to consider claims for insurance had been recalled, as aforesaid.

These amendments further provided for an extension of the appeal period from sixty days to a year.

The above quoted words were not omitted from the procedure because of any doubt in my mind as to my authority to make such provisions in the premises, but simply as an act of courtesy to the Department of Justice, to which had been transferred by Executive Order, effective September 11, 1933, all responsibility for the preparation for trial, and the trial of suits for insurance. Copies of the regulations and procedure, above referred to, are enclosed.

Very truly yours,

FRANK T. HINES,
Administrator.

Enclosures: (8)

Chg. Appropriation SALARIES & EXPENSES
V. A. 1933

RADIOGRAM PRIORITY
OFFICIAL BUSINESS—
GOVERNMENT RATES

Washington, D. C., March 17, 1933

HWB:hck
Room 1018
"Gov't. Vets. Adm."

TO ALL REGIONAL OFFICERS AND COMBINED FACILITIES

(As per attached list)

Discontinue all actions including Medical Examinations claimants yearly renewable term insurance benefits. You will immediately prepare for release to claimants whose claims for yearly renewable term insurance including automatic insurance are pending in your office. The following notice to be released upon instruc-

tions from Central Office. Copy to be filed in claimant's folder. Quote the provisions of the act of March blank entitled "An Act to Maintain the Credit of the United States Government," specifically repealed all laws granting or pertaining to yearly renewable term insurance except as to cases wherein contracts of yearly renewable term insurance have matured prior to March blank and under which payments have been commenced or in which judgments have been rendered in a court of competent jurisdiction. In any suit on a contract of yearly renewable term insurance or in which judgments may hereafter be rendered in any such suit now pending period under these provisions favorable consideration of your claim for benefits under a contract of yearly renewable term insurance is barred and no further action in connection with your claim can be taken by the Veterans' Administration period under these circumstances. I regret to advise you that further inquiry or correspondence from you seeking further consideration of this claim will necessarily be of no avail. . . .

HINES

COPY

RADIOGRAM

H. L. M. /mvm/F Room 700
March 21, 1933.

To all R. O. and combined facilities:

Act relative veterans benefits signed by President, March 20, stop. Release notices to claimants for benefits yearly renewable term insurance accordance Radiogram March 17.

Secured from records
of Mail Room 317

BREINING

July 6, 1934
MEMORANDUM

For Employees of the Council:

Term insurance cases, with the exception of those coming under the provisions of Section 305, may now be adjudicated.

H. H. Mills,
Chief, Insurance Claims Council.

From: Chief, Insurance Claims Council
To: Members of the Council
Subject: Issuance of letters of disagreement by Insurance Claims council

November 2, 1934
FDB

The issuance of letters of disagreement, Forms 909 and 909-A, and/or any letter advising that a claim for insurance has been denied is suspended from this date until further instructions are issued.

Notwithstanding the above, the Council will continue to render decisions.

A record of all cases in which claims for insurance are denied will be maintained and the files therein retained in Central Office.

Letters advising that payment of further benefits will cease either by reason of a finding of recovered ability or otherwise will continue to be sent.

/s/ H. H. Milks.

February 1, 1935

From: Chief, Insurance Claims Council
To: Members of the Council
Subject: Letters of Disagreement

Effective immediately all letters with all carbons ad-

vising that claims for insurance have been denied and/or advising that payment of insurance benefits has been discontinued, such letters being known as "Letters of Disagreement," will be routed to the Registration Clerk.

/s/ H. H. MILKS.

August 23, 1935
FDB

Acting
From: Chief, Insurance Claims Council
To: Members of the Council
Subject: Notification to claimants of denial of claims

This service is in receipt of a memorandum dated August 21, 1935, quoted below, from the Administrator to the Assistant Administrator with reference to the above subject—

> "To obviate any possibility that failure of the Veterans' Administration to notify claimants immediately of the denial of insurance claims by the Insurance Claims Council or the Board of Veterans' Appeals may shorten the time thereafter available in which to bring suit, it is necessary that notification of the denial of any insurance claim be prepared and dispatched to the claimant prior to close of business on the day when the decision denying the claim has been rendered by the Council or the Board of Veterans' Appeals.
>
> "Appropriate measures must be taken to insure compliance with this instruction in every case."

Strict compliance will be made with the Administrator's instruction. Hereafter decisions, denying claims for insurance or finding that an insured has recovered the ability to follow a substantially gainful occupa-

tion, will not be dated by the Decision Release Clerk but will be dated by the Registration Clerk. The Decision Release Clerk will refer such decisions undated to the Adjudicator who will prepare the letter (Form 909 series when in order) except that the letter so prepared will not be dated and will also omit the date of the decision. This letter with the decision and the file will be referred to the Registration Clerk who will date the decision as of the same date carried by the letter advising of the decision. The Registration Clerk will also place in the letter, the date of the decision.

Particular attention must be given that the instruction from the Administrator provides that the letter notifying the claimant of the denial must carry the same date as the decision and be mailed before the close of business on said date.

Hereafter decisions of the Council will not become final until dated.

/s/ A. J. McIntyre, M. D.

IN THE

SUPREME COURT OF THE DISTRICT OF COLUMBIA

Law No. 82284

Filed July 9, 1935

EDWARD J. BOWERS,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

SUIT FOR WAR RISK INSURANCE

REPORT OF COMMISSIONER UPON JURISDICTIONAL QUESTIONS RAISED BY DEFENDANT'S PLEAS TO THE AMENDED DECLARATION

This is a suit for the recovery of monthly disability benefits under plaintiff's $10,000 contract of war risk term insurance.

The amended declaration contains two counts. The

first count is predicated upon plaintiff's having become permanently and totally disabled on, to wit, June 1, 1919, on which date his insurance is alleged to have been in force through the payment of premiums by plaintiff. The second count is predicated upon plaintiff's becoming so disabled on February 1, 1920 to which date it is alleged his said insurance was continued in force by reason of circumstances bringing it within the revival provisions of Section 408 of the War Risk Insurance Act and Section 305 of the World War Veterans' Act, 1924, as amended.

In each of said counts it is alleged that on, to wit, June 29, 1931, plaintiff made written demand of the Veterans' Administration and that said claim was denied by the Administrator of Veterans' Affairs on January 19, 1933. Suit was instituted January 20, 1933.

In its pleas to the amended declaration defendant avers: (1) That the claims sued upon were not denied by the Administrator of Veterans' Affairs, or by any one acting in his name, as required by the provisions of Section 19 of the World War Veterans' Act, 1924, as amended July 3, 1930; and (2) That the claims sued upon are barred by the limitations on suit contained in said Section 19, as so amended. And as to each count of the amended declaration, defendant further says:

> . . . defendant further denies that the plaintiff filed claim or demand for the payment of War Risk Insurance benefits in the United States Veterans Administration on June 29, 1931, or at any other time prior to July 2, 1931; and avers that the claim filed on July 2, 1931, was denied by the Insurance Claims Council of the United States Veterans Administration on January 13, 1933,

and the plaintiff and his then attorney were notified of said denial on, towit, January 17, 1933.

A stipulation as to the jurisdictional questions raised by defendant's pleas has been filed, which sets out the correspondence between plaintiff and the Veterans' Administration with respect to his claim for insurance benefits.

At the hearing on said issues before me it was verbally stipulated by Mr. Jordan R. Bentley, plaintiff's attorney, and Mr. Frank Smith, appearing for defendant, that the court might take the dates of receipt, stamped or written in the exhibits attached to the stipulation, as the actual dates of the receipt by the addressees of the papers so marked.

STATUTES INVOLVED

Section 19 of the World War Veterans' Act, 1924, as amended July 3, 1930, provides, in part:

> Sec. 19. In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States. . . .
>
> No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, . . . *Provided further*, That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. . . .

> The term "claim" as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits and the term "disagreement" means a denial of the claim by the director or some one acting in his name on an appeal to the director. . . .

The Joint Resolution of Congress approved January 28, 1935, entitled, "Joint Resolution to clarify the definition of disagreement in section 19, World War Veterans' Act, 1924, as amended," provides:

> That a denial of a claim for insurance by the Administrator of Veterans' Affairs or any employee or agency of the Veterans Administration heretofore or hereafter designated therefor by the Administrator shall constitute a disagreement for the purposes of section 19 of the World War Veterans' Act, 1924, as amended (U. S. C., Supp. VII, title 38, sec. 445). This resolution is made effective as of July 3, 1930, and shall apply to all suits now pending against the United States under the provisions of section 19 of the World War Veterans' Act, 1924, as amended, and any suit which has been dismissed solely on the ground that a denial as described in this resolution did not constitute a disagreement as defined by section 19 may be reinstated within three months from the date of enactment of this resolution.

Section 5 of the World War Veterans' Act, 1924, as amended, provides:

> Sec. 5. The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for

that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act and all decisions of questions of fact affecting any claimant to the benefits of Titles II, III, or IV of this Act, shall be conclusive except as otherwise provided herein. All officers and employees of the bureau shall perform such duties as may be assigned them by the director. All official acts performed by such officers or employees specially designated therefor by the director shall have the same force and effect as though performed by the director in person. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of compensation, insurance, vocational training or maintenance and support allowance provided for in this Act, the forms of appplication of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards.

Section 2 of the Consolidation Act, approved July 3, 1930 (38 U. S. C., Supp. 11a) provides, in part:

> Sec. 2. There shall be at the head of such Veterans' Administration an administrator to be known as the Administrator of Veterans' Affairs, . . . Upon the establishment of such Veterans' Administration all the functions, power and duties

now conferred by law upon . . . the Director of the United States Veterans' Bureau are hereby conferred upon and vested in the Administrator of Veterans' Affairs. . . .

REGULATIONS OF THE ADMINISTRATOR OF VETERANS' AFFAIRS IN REGARD TO THE ESTABLISHMENT AND FUNCTIONS OF THE INSURANCE CLAIMS COUNCIL

The Insurance Claims Council was established in the Adjudication Service of the Veterans' Administration by Regulations of the Administrator (paragraphs R-1000 and 1310-1312, Regulations and Procedure), effective March 16, 1931. On July 1, 1931, said Council was transferred to the Insurance Service by the Administrator, and said paragraphs R-1000 and 1310-1311 were cancelled by paragraphs R-3200-3205 and 3100-3109, effective November 1, 1931.

In January 1933, when the decision of the Insurance Claims Council here involved was rendered, the pertinent provisions of the last-mentioned regulations, as amended prior to said time, were:

R-3200 ESTABLISHMENT OF INSURANCE CLAIMS COUNCIL.—There is hereby established in the insurance service, central office, an insurance claims council which will be in charge of a chief who shall be responsible to the director of insurance for the proper functioning of such council. The council shall be composed of such other personnel as may be found necessary for the purpose of carrying on the duties and functions assigned thereto. (November 1, 1931).

R-3201 DUTIES OF THE INSURANCE CLAIMS COUNCIL—(A) The insurance claims

council is vested with exclusive jurisdiction in determining total and permanent disability for the purpose of automatic insurance, United States Government life insurance, and yearly renewable term insurance (except that in said yearly renewable term insurance for the purposes of Section 19 of the World War veterans' act, as amended, the managers of regional offices and combined facilities are vested with concurrent jurisdiction to finally deny the type of claims specified in subparagraph 1 hereof). (August 1, 1932).

R-3204 APPEAL FROM DECISION BY INSURANCE CLAIMS COUNCIL—Where the insurance claims council finds that permanent and total disability does not exist as alleged, such denial shall be final. However, the veteran or his representative shall have the right of appeal to the Administrator from any finding made pursuant to the authority contained in paragraphs R-3200 to 3203 providing such appeal be exercised within sixty days from the date of receipt of notice of the final action of the council. Such appeal must be in writing and otherwise comply with the regulations governing appeals to the Administrator. (November 1, 1931).

3106 DECISIONS RENDERED BY INSURANCE CLAIMS COUNCIL—Decisions of the insurance claims council will be prepared and signed in triplicate by not less than two members of the council. The original copy of the decision will be placed in the central office folder, one carbon copy will be placed in the regional office folder, and the other carbon copy will become a part of the permanent records of the insurance claims council. The claimant and other interested parties will be informed of the decision rendered by the council. (November 1, 1931).

3107 APPEAL FROM DECISIONS RENDERED BY INSURANCE CLAIMS COUNCIL

—If a decision is rendered by the insurance claims council adverse to the allegation made by the claimant, a letter so advising the claimant will be concurrently prepared and sent to the claimant at his last address of record. Said letter will advise the claimant the date on which the council denied the claim, and that the claimant may consider such denial final for purposes of instituting suit under Section 19 of the World War veterans' act, 1924, as amended. Said letter should further advise the claimant that if he accepts the denial of the claim by the council as final, the suspension of the statute of limitations proveded by section 19 shall cease from and after the date of this letter plus the number of days usually required by the post office department for the transmission of regular mail from Washington, D. C., to the claimants last address of record, and that his case folder has been forwarded to the appropriate office or station (giving name and address of office or station) and that any future inquiries should be directed to that office or station. If an appeal is filed the case file together with the appeal will be forwarded by the regional office or combined facility to the administrator, through the director of insurance, who shall at the time of forwarding the same indicate his approval or disapproval of the decision of the insurance claims council, from which appeal is taken. (November 1, 1931).

COMMISSIONER'S OPINION

I

As to the Plea of No Disagreement

Defendant's plea that the claims sued on were never denied by the Administrator of Veterans' Affairs, nor by any one acting in his name on appeal to him, as re-

quired by Section 19 of the World War Veterans Act, 1924, as amended, was not pressed by counsel for the Government at the hearing before me, presumably because the Joint Resolution of Congress approved January 28, 1935, clarifying the definition of the term "disagreement", as used in said section, had removed that objection.

There can be no doubt, under the stipulated facts and the regulations, that the claim for insurance benefits embodied in the letter dated June 29, 1931 addressed by plaintiff's then attorney, Warren E. Miller, to the Administrator of Veterans' Affairs (Exhibit A to stipulation) was properly and finally denied by an "employee or agnecy of the Veterans' Administration" designated for the purpose by the Administrator and that such denial constituted the necessary jurisdictional disagreement.

I refer, in this connection, to the letters of denial, based upon the decision of the Insurance Claims Council dated January 13, 1933, written plaintiff and his said attorney by H. L. McCoy, Director of Insurance of the Veterans' Administration, dated January 16, 1933 and January 19, 1933, and set out as Exhibits B, C, E and F to the stipulation.

An examination of the regulations of the Administrator set out above will disclose that the Insurance Claims Council was authorized by the Administrator to give final denials (par. R-3204) and that the Director of Insurance was the official to whom the Council was responsible (par. R-3200) and therefore the one authorized to send letters to claimants advising them of such denials (par. 3107).

II

As to the Statute of Limitations

Defendant's plea of the statute of limitations raises a more serious issue. It involves the question when an adverse decision of the Insurance Claims Council takes effect as a denial of a claim for insurance benefits within the meaning of the provision of Section 19 of the World War Veterans' Act, 1924, as amended, providing for the suspension of the limitation on suit "for the period elapsing between the filing in the bureau of the claim sued on and the denial of said claim by the director."

It appears from the written stipulation in this case that the letter of plaintiff's then attorney, Warren E. Miller, dated June 29, 1931, claiming insurance benefits (Exhibit A to the stipulation) was not received in the Veterans' Administration until July 2, 1931, according to the earliest date of receipt stamped thereon, when all but one day of the year from July 3, 1930 allowed by the statute for filing such a claim had expired (the six-year period also allowed therefor-i.e., six years from the happening of the contingency on which the claim is founded-having previously expired).

It was therefore incumbent upon plaintiff to institute suit on said claim within one day after the denial of said claim "by the director," which phrase in this instance, as the result of the operation of the Consolidation Act of July 3, 1930 and the Joint Resolution approved January 28, 1935, means a denial of said claim by the Administrator of Veterans' Affairs or some employee or agency authorized by him to give such denials.

The decision of the Insurance Claims Council denying plaintiff's claim was rendered January 13, 1933, according to the letter addressed to plaintiff by the Director of Insurance of the Veterans' Administration (Exhibit B).

Said letter was dated January 16, 1933 and addressed to plaintiff at New Haven, Connecticut. A carbon copy of said letter (Exhibit E) was also enclosed in a letter of the same date sent by said Director of Insurance to plaintiff's then attorney, Warren E. Miller, at Washington, D. C. (Exhibit c). Under date of January 19, 1933, said official again wrote Attorney Miller at Washington D. C., of said decision of the Insurance Claims Council (Exhibit F).

The two letters of the Director of Insurance addressed to Attorney Miller at Washington, D. C., (Exhibits C and F) and the carbon copy of the letter to plaintiff (Exhibit E) are stamped "Received January 20, 1933." The letter addressed to plaintiff at New Haven, Connecticut, (Exhibit B) is stamped "Received January 23, 1933."

As previously stated, it was verbally stipulated by counsel at the hearing before me that all of said letters were received by the addressees on the dates shown by the notations stamped thereon. Said verbal stipulation may be accepted by the Court, except as to the notation on the original of the letter of the Director of Insurance to the plaintiff dated January 16, 1933 which is stamped "Received January 23, 1933." I am advised by Mr. Jordan R. Bentley, plaintiff's present attorney, that that notation was made on said letter by Mr. Miller, plaintiff's former attorney, and indicates the date on which the latter received said letter by mail from the plaintiff, not the date when plain-

tiff received it by mail from the Veterans' Administration. I infer, however, that said letter was not mailed to plaintiff until January 19th, and was not received by the plaintiff before January 21st.

My conclusions therefore is that the earliest date on which plaintiff, or his representative authorized to receive notice, is shown by the stipulated facts to have received from the Director of Insurance notice of said adverse decision of the Insurance Claims Council on his claim was January 20, 1933, when his attorney, Mr. Miller, received the two letters from the Director of Insurance on January 16th and January 19th, as well as the copy of said official's letter to plaintiff of January 16th.

Counsel for the Government contend that the adverse decision of the Insurance Claims Council on plaintiff's claim became effective as a denial upon the rendition of said decision—January 13, 1933. There seems to be but lttle judicial support for this contention, whereas a number of Federal courts have held that decisions of the Council and other agencies of the Veterans' Administration become effective only upon receipt by the claimants of notice thereof, and one decision seems to hold that the denial is effective on the date of the letter advising the claimant of the decision. These decisions are reviewed hereinafter.

Since, as above pointed out, there was but one day left in which plaintiff could institute suit after receiving a denial of his claim, it is obvious that if said denial was effective January 13, 1933, the date of the decision of the Insurance Claims Council, or January 16, 1933, the date of the letter of denial addressed to plaintiff, the statute had run before suit was instituted. But if the denial was not effective until the date of receipt

of notice of the denial by Attorney Miller on January 20, 1933, the suit, which was filed the same day, was timely brought.

In my opinion, under the acts of Congress and the regulations of the Administrator of Veterans' Affairs in force at the time, the decision of the Insurance Claims Council of January 13, 1933, became effective as a denial of plaintiff's claim for the purpose of ending the suspension of the running of the period of limitations and permitting the institution of suit on the claim, upon the receipt of notice thereof by Attorney Miller on January 20, 1933, and not before.

The World War Veterans' Act, 1924, as amended, and the Joint Resolution of Congress of January 28, 1935, do not specify the form in which denials of claims for insurance benefits shall be given. They merely state who may give such denials. However, Section 5 of the World War Veterans' Act, 1924 (set forth above), provides that "the director shall adopt reasonable and proper rules . . . to regulate and provide for . . . the forms of applications of those claiming to be entitled to such benefits, . . . and the manner and form of adjudications and awards." Insurance, it will be noted, is one of the benefits referred to by the phrase "such benefits" just quoted. The authority given, in my opinion, embraces authority to the Director to regulate the method and form of denials of claims for insurance benefits, including the time when such denials shall take effect. Since the creation of the Veterans' Administration said authority has been held by the Administrator of Veterans' Affairs under the terms of Section 2 of the Consolidation Act of July 3, 1930, set forth above. The regulations which have been adopted under such authority

and which are pertinent in the case at bar are contained in paragraphs R-3201, R-3204, 3106 and 3107 of the Administrator's Regulations and Procedure, set forth above.

Paragraph R-3201 vests the Insurance Claims Council with jurisdiction in determining total and permanent disability for insurance purposes. Paragraph R-3204 provides that when the Insurance Claims Council finds that permanent and total disability does not exist, such denial shall be final, subject to the right of appeal to the Administrator therein granted to claimants.

Paragraph 3107 contains the regulations as to notice which are directly involved in the determination of the question of the effective date of a denial. Paragraphs 3106 and R-3204 also throw light on the subject.

Paragraph 3107 requires notice of an adverse decision by the Insurance Claims Council upon his claim to be given to the claimant, and provides when and how such notice shall be given, as well as what the claimant shall be advised with respect to its effect on the institution of suit and the suspension of the running of the limitation on suit caused by the filing of the claim in the Veterans Administration.

The requirement in said paragraph that the claimant shall be *advised by letter* of the adverse decision of the Insurance Claims Council implies that the denial is not effective until the claimant is so advised, which means upon receipt by him (or his representative) of the letter containing such advice.

That this is the proper conclusion to draw seems to be indicated also by the provision in said paragraph 3107 that the claimant shall be advised that the suspension of the statute of limitations shall cease at the time

designated therein "if he *accepts* the denial of the claim by the council as final." The claimant certainly cannot "accept" or reject a denial of which he has not been notified, and therefore it must have been the intent of the Administrator to make such denial effective upon actual receipt of notice thereof by the claimant or his representative.

Paragraphs 3106 and R-3204 also support this conclusion. The first provides that "the claimant and other interested parties *will be informed* of the decision rendered by the council." (italics mine). The latter, in giving the claimant the right of appeal from the decision of the Insurance Claims Council, makes such right conditional upon appeal being "exercised within sixty days from *the date of receipt of notice* of the final action of the council" (italics mine). The provision quoted from paragraph 3204, it is to be noted, was incorporated in the letter of the Director of Insurance to plaintiff (Exhibit B).

It might be argued that the provision in paragraph 3107 that said letter should further advise the claimant that, if he accepts the denial of the claim by the council as final, "the suspension of the statute of limitations provided by section 19 shall cease from and after the date of this letter plus the number of days usually required by the post office department for the transmission of regular mail from Washington D. C., to the claimants last address of record," would make the denial effective, in ending the suspension of the statute of limitations, upon the day designated irrespective of whether the letter had actually been delivered or whether the letter had been mailed on the day it was dated. But to so hold would be to give greater effect to said provision that obviously was in-

tended, and I doubt if such a view could be upheld even if shown to have been intended by the Administrator.

This provision of the regulations was evidently framed upon the assumption that the notice to a claimant of the denial of his claim would be mailed upon the date it was dated and would be delivered in the regular course of mail at the claimant's last address of record in the bureau. At most such a regulation would only create a rebuttable presumption of fact as to when the plaintiff received such notice, upon proof that it was actually mailed on its date. (22 Corpus Juris 98, Evidence, Sec. 38, and cases cited.) In the case at bar no such presumption can be indulged, since the dates of the receipt of the various letters advising the plaintiff and his attorney of the denial of his claim have been stipulated. Furthermore, there is no evidence or stipulation as to the dates when said letters were mailed.

DECISIONS INVOLVING THE DETERMINATION OF THE EFFECTIVE DATE OF A DENIAL OF A CLAIM FOR INSURANCE BENEFITS.

In each of the cases cited below the court was faced with the precise question now before this court, namely, as to when the denial "by the director" of a claim for insurance benefits occurs, within the meaning of the provision in Section 19 of the World War Veterans' Act, 1924, as amended July 3, 1930. The better reasoned opinions in these cases hold that decisions of the agencies of the Veterans' Administration do not become effective as denials of insurance claims until the claimants receive notice thereof.

Thus, in *United States vs. Walker,* decided April 13,

1935, 77 F (2d) 415, the Circuit Court of Appeals for the Fifth Circuit expressed itself on the point in question as follows:

> . . . Under the statute the period of limitation was extended beyond July 3, 1930, the date of the enactment of the statute, for the period elapsing between the filing in the bureau of the claim sued upon and the denial of that claim by the director. The claim sued upon having been filed in the bureau on June 26, 1931, and this suit having been brought on June 6, 1932, the suit was brought within the time allowed if within the meaning of the statute the denial of the claim by the director became effective upon appellee's receipt on May 31, 1932, of notice of that action. Appellant contends that the denial became effective on the day it was dated, May 27, 1932. In our opinion that contention is not sustainable. It is to be noted that under the statute the period of extension begins with: "the filing in the bureau of the claim sued upon," and ends, not with the filing of the order denying the claim, but with "the denial of said claim by the director." It well may be supposed that in enacting the statute the lawmakers had in mind the methods pursued in the bureau in dealing with such claims, that claims are transmitted by claimants from all parts of the country, and that a claimant first learns of the bureau's action on his claim when he is informed of that action by the bureau, and that communications between claimants and the bureau generally are by mail. Nothing in the language of the statute indicates a purpose to make a denial of the claim effective prior to delivery of notice of it at the place of the claimant's address. A regulation covering the matter of giving notice of disagreement to the claimant was in force at the time appellee's claim was acted on. That regulation provides for the claimant being informed by letter

of a denial of his claim, and that "the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C. to the claimant's last address of record." The adoption of that regulation was the exercise of a power conferred by Section 19 of the World War Veterans' Act, as amended. 38 U. S. C. A. Section 445, *Boan vs. United States,* 3 Fed. Supp. 219. It could not reasonably have been contemplated that the period of extension of limitation would end, with the result of enabling the claimant to bring suit on his claim, prior to the receipt at claimant's last address of record of notice of the denial of his claim. Certainly it was not contemplated that it would be permissible for a claimant to institute suit on his claim prior to his receipt of information of the denial of that claim by the director. The language used in the statute is entirely consistent with the existence of an intention that the denial of the claim become effective at the time of the receipt of the claimant's address of notice of that action. We concur in decisions to the effect that the suspension of limitation ends at that time, not before the claimant could have been aware that he had the right to bring suit on his claim. *Weaver vs. United States,* 72 Fed. (2) 20; *Creasy vs. United States,* 4 Fed. Supp. 175.

The regulation referred to in said opinion is paragraph 3107 of the Administrator's Regulations and Procedure, set forth and discussed above and upon which your Commissioner's opinion is based.

In *Boan vs. United States* (D. C., Idaho), 3 F Supp. 219, cited in *United States vs. Walker,* supra, after the evidence on the point was in, the defendant moved

to dismiss the suit on the ground that no disagreement had been proven. The opinion on said motion shows that plaintiff's claim for insurance benefits had been denied by the Insurance Claims Council on July 21, 1931 and plaintiff notified thereof; that under the regulations of the Veterans' Administration then in force, the Insurance Claims Council did not have authority to give a disagreement; that subsequently the regulations set forth above, which give the Insurance Claims Council such authority, were promulgated; that thereafter the Director of Insurance wrote plaintiff on November 25, 1931 advising him that he might consider the denial of the Insurance Claims Council rendered July 21, 1931, final for the purpose of instituting suit, the letter following in form the letter to plaintiff in the case at bar (Exhibit B). Judge Cavanah, after discussing the authority embodied in the statutes and regulations, then said:

> . . . They write this letter, after those regulations are in force, and which are binding here, telling him that he may now consider the action of the insurance claims council, back in July, as their action now. They amend the letter of July 21, 1931, saying, "The letter forwarded to you under date of July 21, 1931, is amended accordingly." They adopt that as the record of the council, and send this man word that his claim is disallowed on November 25, 1931. He brings his suit on December 21, 1931, within forty-one days, under the law as I interpreted it in the Carson case, from the time he received final action, and I now interpret that this final action or disagreement did not occur until receipt of the letter of November 25, 1931. . . . .

In *Weaver vs. United States,* 72 F. (2d) 20, decided June 28, 1934, the Circuit Court of Appeals for the Fourth Circuit (then composed of Circuit Judges Northcott and Soper and District Judge Chesnut) said, speaking by Judge Chesnut:

> In our opinion the ruling appealed from was correct. Obviously, under the statute, the suit was too late unless saved by the proviso in the section. The effect of this proviso is that the statute of limitations was suspended for the number of days, prior to and including July 3, 1931, that the claim was pending in the Bureau and the plaintiff was entitled to bring suit within that number of days after notice of disallowance of his claim by the Bureau. . . .

After holding that it did not sufficiently appear from the established facts that the claim was filed until after July 3, 1931, the opinion of said court proceeds (italics mine):

> Even if it could fairly be found from the facts stated that the plaintiff's claim was received by the Bureau on July 3, 1931, it could not be said that the statute was suspended for more than one day; and therefore after the denial of liability by the Bureau and *receipt of notice thereof* by the plaintiff he had only one day thereafter at the most to institute suit. . . .

This opinion is particularly interesting because, as will be seen later, said Circuit Court of Appeals, when composed of three other judges, held that notice of the denial of a claim by the Insurance Claims Council was not necessary. (*Tyson vs. U. S., infra.*)

In Creasy vs. United States, (D. C., Virginia), 4 F.

Supp. 175, decided January 31, 1933, Judge Paul said:

> It is necessary here to determine (1) whether a claim is deemed to be filed as of the date when the claimant mails it to the Bureau or as of the date when it is received by the Bureau; and (2) whether it is to be treated as denied as of the date when the proper officer of the Bureau set down in writing his denial or as of the date when the claimant received such writing.
>
> On the latter of these questions, I have little doubt. It seems logical that the claim is to be taken as denied as of the date when the claimant is informed of the denial. The limitation on bringing suit is suspended while the claim is under consideration by the Bureau, but begins to run again as soon as the claim is denied; and the duty then rests upon the claimant to bring his suit within such time as remains of the period of limitation. If the act of denial of the claim imposes upon the veteran the condition that he must sue within a limited time thereafter, surely he cannot be expected to comply with this condition until such time as he has knowledge of the denial of his claim. In fact, he cannot sue until he knows that his claim has been denied and is no longer under consideration at the Bureau. Only after he has received notice of the denial can he allege the disagreement which is essential to the maintenance of a suit. I hold, therefore, that the claim is to be taken as denied on the date when the claimant received the letter informing him of the denial.
>
> . . .

Judge Paul then went on to discuss the relationship between the date of the letter and its receipt, saying:

> It may be argued that it is unreasonable to suppose that a letter dated May 6th in Washing-

ton did not reach Roanoke, Va., until May 10th. But the time when the letter was received is a matter to be shown by evidence, and in this case the only evidence introduced is that the letter of denial was received on May 10th, inclosed in an envelope postmarked at Washington on May 9th. With the enormous correspondence handled in the Veterans' Bureau, it is not improbable that the letter was not mailed for a day or so after May 6th. On the evidence, I must hold that the plaintiff received notice of the denial of his claim on May 10th, as stated by him.

In Snow, Admr., vs. United States (D. C. North Carolina), defendant had moved to dismiss the action because barred by the statute of limitations. The opinion on said motion, dated May 14, 1934, shows that it was stipulated that the letter of disagreement was dated November 17, 1932 and received November 20, 1932, and that November 20, 1932 was on Sunday. The opinion then states:

> From the foregoing facts the Court finds that the statute of limitations ceased to run on the claim on the 15th day of June 1931, and that it did not begin to run again until Nov. 21, 1932, for the reason that November 20th was on Sunday, the day when the denial was received.
>
> The Court further finds that the plaintiff had nineteen days left for the making of a demand or commencing her action before the claim was filed in the Veterans Bureau, and it further finds that the action was commenced on the nineteenth day after the receipt of the denial, and that the claim is not barred by the statute of limitations.

In *Albek vs. United States* (D. C., New York), 4 F. Supp. 1020, decided November 10, 1933, defendant

moved to dismiss the suit because no disagreement existed at the time the action was brought, the motion being based on plaintiff's bill of particulars. In his opinion, Judge Byers states that said bill of particulars shows that there had been a denial by the Insurance Claims Council from which appeal had been taken, resulting in a letter from the Director of Insurance, dated October 7, 1932, affirming the conclusions of the Insurance Claims Council, and that said letter was received on or about October 12, 1932. Judge Byers then states (italics mine):

> The contention offered by the *defendant* is that there was no disagreement until the date of the receipt of the last mentioned letter, which embodied a decision of the Administrator's Board of Appeals, and consequently, when the petition was filed on September 6, 1932, no disagreement existed.
>
> There seems to be no escape from the conclusion that this is so. Had the plaintiff not taken an appeal from the letter dated May 21, 1932, he might have urged (without success if Harp vs. U. S. (D. C.) 2 F. Supp. 32, were followed) that it constituted a disagreement sufficient to sustain his petition; but, in order to do that, he would have to show that the petition was filed within four days after receipt of that letter. While the presumption is that that letter was delivered in due course and long prior to September 2, 1932, the plaintiff would be given an opportunity to show the date of actual receipt and the matter would not be disposed of on motion; but, as he relies upon the letter dated October 7, 1932, for his disagreement, by moving to have this cause postdated as to its filing, it is apparent that the defendant's motion must be decided upon the theory held in common by the plaintiff and the de-

fendant, that the disagreement did not arise until the receipt of the letter of October 7, 1932.

The only reasoned decision in support of the Government's contention that the adverse decision of the Insurance Claims Council on plaintiff's claim became effective as a denial upon the rendition of said decision, is that of the Circuit Court of Appeals for the Fourth Circuit in *Tyson vs. United States*, 76 F. (2d) 533, decided April 2, 1935. In my opinion, however, said decision is not well reasoned. The court, speaking by Judge Parker, there said:

> . . . The running of the statute is suspended when the claim is filed in the Bureau of War Risk Insurance of the Veterans Administration, not when it is deposited in the mails. *Weaver vs. U. S.* (C. C. A. 4th) 72 Fed. (2d) 20. And it is denied by the director when he takes action denying it, not when notice of denial is received by the insured. *Corn vs. United States* (C. C. A. 10th) 74 Fed. (2d) 438; *U. S. vs. Thomson*, (C. C. A. 10th) 71 Fed. (2d) 860; *U. S. vs. Gower* (C. C. A. 10th) 71 Fed. (2d) 366; *Stallman vs. U. S.* (C. C. A. 8th) 67 Fed. (2d) 675; *Roberts vs. U. S.* (C. C. A. 10th) 66 Fed. (2d) 273; *Hunnewell vs. U. S.* 2 Fed. Supp. 389; *Hipkins vs. U. S.*, 1 Fed. Supp. 505. We have considered the reasoning to the contrary of this last proposition in *Creasy vs. U. S.*, 4 Fed. Supp. 175, but we are not convinced by it. The language of the statute is clear and unambiguous. The statute is "suspended for the period elapsing between the filing in the Bureau of the claim sued upon and the denial of said claim by the director." Only Congress can prescribe the terms upon which the Government may be sued; and when it has done so clearly and unequivocally, neither the bureaus charged with the administra-

> tion of the act nor the courts may add to or take from these terms. Congress might have provided for the suspension of the statute until the insured should be notified of the rejection of his claim. It has not done so, but has provided for suspension only during the period between the filing of the claim and its denial by the director.

Said court, while finding support in its decision in the Weaver case, supra, upon the point that the running of the statute of limitations is suspended when the claim is filed in the Bureau and not when it is deposited in the mail, over-looked or ignored the fact that it was also held in the Weaver case that the suspension was not lifted until the claimant had received notice of the denial of his claim, although the court did refer to the decision of the District Court in the Creasy case, supra, which expressed the same view. As pointed out above, said Circuit Court of Appeals, when it decided the Tyson case, was composed of an entirely different group of judges from that which decided the Weaver case.

Furthermore, the decisions cited by Judge Parker do not entirely support the ruling that a claim "is denied by the director when he takes action denying it."

Thus, in the case of *United States vs. Gower,* 71 F. (24d) 366, decided by the Circuit Court of Appeals for the Tenth Circuit, the view taken by Judge Parker is suggested rather than decided, the point not being material. Nor does the court refer to the regulations or reason the matter out carefully. All that it says, in answer to plaintiff's contention that he personally had no knowledge of the denial of his claim until January 18, 1932, is:

That may be true, but we see no reason why he should not be bound as of the date of the denial of the claim, which is in accord with the plain meaning of the statute. But whether we take that date or the date on which notification came to his attorney, the bar had ran when the suit was instituted on January 20, 1932. Notification to his attorney, who carried on correspondence with the Veterans' Bureau concerning the claim, was notification to him.

In the case of *United States vs. Thomson*, 71 F. (2d) 860, said Circuit Court of Appeals for the Tenth Circuit chose the date of the letter of denial rather than the date of receipt of said letter as the date of denial. The only information apparently before the court as to the denial was that contained in the amended complaint which alleged that the claim "was rejected by letter dated September 19, 1932, and that such letter was received in due course of mail on September 22, 1932." It does not appear from said decision by what agency the claim referred to was rejected.

In the cases of *Roberts vs. United States* (C. C. A. 10th) 66 F. (2d) 273, *Corn vs. United States* (C. C. A. 10th) 74 F. (2d) 438, *Hipkins vs. United States* (D. C., Md.) 1 F. Supp. 505, and *Hunnewell vs. United States* (D. C., N. H.) 2 F. Supp. 389, cited in the Tyson case, it does not appear that the question of notice was actually passed on, the opinions merely referring to the claims having been denied on certain dates, without stating whether those dates are the dates of the action by the director, or the dates of the letters of denial or the dates of the receipt of such letters.

And in the case of *Stallman vs. United States*, 67 F. (2d) 675, decided November 10, 1933, the Circuit Court of Appeals for the Eighth Circuit, while taking the

view held by Judge Parker in the Tyson case, states that no regulation requiring notice applicable at the time of the denial involved in the Stallman case had been called to their attention, although pointing out that such a regulation (paragraphs 3106 and 3107, set forth above) had since been promulgated. In this connection the court said:

> The plaintiff was charged with knowledge that he only had six days left in which to bring his suit after disagreement because of his own delay of about twelve years before taking steps to assert any claim on his policy; and it was, therefore, incumbent upon him to acquaint himself with the action of the director on his claim so that he could act promptly and sue within six days if he wanted to. It does not appear that he took any particular steps to this end, or that his failure to learn of the rejection of the claim was chargeable to the neglect of official duty. No formal notice was required to be given to him by the statute, nor has there been called to our attention any regulation requiring such notice applicable at the time. A regulation covering the matter of notice of disagreement to be mailed to the veteran has since been promulgated (Decisions Insurance Claims Council No. 1306, No. 3107, November 1, 1931).

The plain implication of this statement by said Circuit Court of Appeals is that if the regulation referred to by that court had been in force at the time of the denial there involved, a different conclusion would have been reached.

CONCLUSION

For the reasons stated above, it is my opinion that the necessary jurisdictional disagreement existed at

the time this suit was brought and the suit is not barred by the statute of limitations.

I therefore recommend that the jurisdictional defenses interposed by defendant's pleas to the amended declaration be overruled.

Respectfully submitted,

WILLIAM R. HARR,
Commissioner, Veterans' Cases.

IN THE

SUPREME COURT OF THE DISTRICT OF COLUMBIA

Law No. 82284

Filed July 10, 1935

EDWARD J. BOWERS.
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

SUIT FOR WAR RISK INSURANCE

SUPPLEMENTAL REPORT OF COMMISSIONER UPON THE JURISDICTIONAL QUESTIONS RAISED BY DEFENDANT'S PLEAS TO THE DECLARATION.

Since filing my report upon the jurisdictional questions raised by defendant's pleas to the declaration, counsel for the Government has called my attention to the case of *United States vs. Michel,* 282 U. S. 656,

which they believe strengthens the view announced in *Tyson vs. United States*, 76 F. (2d) 533, that a claim for war risk insurance is denied "by the director," within the meaning of Section 19 of the World War Veterans' Act, when the director "takes action denying it, not when notice of denial is received by the insured."

In my opinion, the statute involved in the Michel case is radically different from that involved in the case at bar, and for that reason the decision in the Michel case neither supports the Tyson case, nor opposes the view expressed by me in my report filed July 9th.

The Michel case involved the construction of Section 3226 of the Revised Statutes relating to the collection of the revenue, which, as quoted by the Supreme Court in its opinion, provides:

> No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue. . . . No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax . . . unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

Construing said statute, the Supreme Court said:

> By this statute the United States waived its sovereign immunity from suit. The permission to sue is conditioned on the filing of a claim and the lapse of six months or the disallowance of the claim within that period, and is limited to not more than five years after payment of the tax, unless the claim has been disallowed and the action is commenced within two years from the disallowance.
>
> Neither of these claims was rejected within six months after filing. And in each case more than two years elapsed after rejection before the Commissioner sent notice that the claim had been disallowed. Neither action was commenced within five years after payment of the tax or within two years after disallowance of the claim. The taxpayers contend, and the Circuit Court of Appeals held, that the permission to sue continues for two years after notice that the claims had been disallowed, and that therefore these actions were commenced within time.
>
> As the Commissioner did not act within six months, permission to sue did not depend upon the rejection of the claim or upon the giving of the notice. By the terms of the statute the period within which the government consented to be sued commenced at the expiration of such six months, and continued uninterruptedly through the five-year period following the date of payment and until "two years after the disallowance." While the statute declares that the Commissioner within a specified time shall notify the taxpayer that his claim has been disallowed, it is nowhere stated that the Commissioner's failure to give the notice will in any event operate to extend the time for bringing suit. An implication to that effect cannot prevail against the rule expressly stated. It is clear that, where the Commissioner renders

no decision within six months, the section contemplates that before commencing his suit the taxpayer will ascertain by inquiry whether the Commissioner has acted. This at least suggests that it may be the intention of the act to leave a like burden upon claimants in all cases.

* * * *

Having regard to the rule of strict construction to be applied to waivers by the United States of its sovereign immunity from suit, the clause reasonably may be read merely as a direction to the Commissioner to send the notice to claimant without making the failure so to do have the effect of enlarging the period for suing as otherwise definitely prescribed.

There are two important distinctions between the statute involved in the Michel case and the one involved in the case at bar. (1) The former statute clearly distinguishes between a "disallowance" of a claim and the prescribed notification of the taxpayer by mail of such disallowance, while the latter statute makes no such distinction nor does it indicate what act shall constitute the denial by the director that is required, leaving it within the power of the director to determine the matter, as pointed out in my original report. (2) Under the statute involved in the Michel case, if the Commissioner of Internal Revenue had not acted within six months of the filing of a claim, "permission to sue did not depend upon the rejection of the claim or upon the giving of the notice," as stated by the Supreme Court, while the statute involved here expressly makes the premission to sue depend upon the rejection of the claim.

The statement of the facts in the Michel case indicates a further distinction between the two cases in that it appears to have been the practice for the Commissioner of Internal Revenue to publish schedules showing his action in disallowing claims, such schedules being open to inspection by the claimants, whereas no such practice in the Veterans' Bureau or Administration has ever been called to my attention.

I therefore affirm the conclusion stated in my original report on the jurisdictional questions and my recommendation therein that the jurisdictional defenses raised by the defendant's pleas to the amended declaration be overruled.

Respectfully submitted,

WILLIAM R. HARR,
Commissioner, Veterans' Cases.

SUPREME COURT OF THE UNITED STATES.

No. 192.—October Term, 1935.

Herbert Lester Tyson, Petitioner, vs. United States of America. | On Writ of Certiorari to the United Circuit Court of Appeals for the Fourth Circuit.

[February 3, 1936.]

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioner, Tyson, sued to recover total permanent disability benefits under a war risk term insurance contract, kept in force by premium payments while the insured remained in service. The petition, filed November 17, 1932, alleged that disability had existed ever since the claimant's discharge from the Army, December 18, 1918.

The trial court dismissed the cause for want of jurisdiction, being of opinion that it was not instituted within the prescribed time. The Circuit Court of Appeals affirmed the judgment.

July 3, 1931, Tyson filed his claim with the Veterans' Administration. November 16, 1932, he received from it a letter, dated November 12, 1932 and mailed at Washington November 14, 1932, which stated that this had been denied. Also—"You may consider such denial final for the purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended. If you accept the denial of the claim by the Council as final, the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C., to your last address of record."

The question for decision is whether the petitioner brought suit within the time permitted by Section 19, Act of 1924, as amended. Sec. 445, title 38, United States Code; c. 849, Sec. 4, 46 Stat. 992, approved July 3, 1930.

> "No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been

brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, . . . : *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director."

Manifestly, suit was not begun within six years after the right accrued, or within one year after July 3, 1930. Permission to sue had expired unless the limitation was suspended between the filing on July 3, 1931 and November 17, 1932, when proceedings began in the trial court.

Whether the denial occurred November 12th, the date given the letter of advice, or November 14th, when this was mailed, or November 16th, when the claimant actually received it, although much debated by counsel, we need not consider.

The statute provides: No suit . . . shall be allowed . . . unless . . . brought within six years after the right accrued . . . or within one year after July 3, 1930, whichever is the later date. But this limitation was suspended by the proviso for the period between the filing and denial of the claim.

In any view, the denial occurred not later than November 16th, 1932. And, with that day, the suspension of the statute ended—certainly the period between July 3, 1931 and November 16, 1932 did not extend beyond the latter day. The plain words employed by Congress require this conclusion. Suit was not begun until the 17th, and that was too late.

Affirmed.